DOCUMENT RESUME

ED 213 812 UD 022 168

AUTHOR	Gerebenics, Gail; And Others
TITLE	Under the Rule of Thumb: Battered Women and the Administration of Justice.
INSTITUTION	Commission on Civil Rights, Washington, D.C.
PUB DATE	Jan 82
NOTE	110p.; For a related document, see ED 177 450.
EDRS PRICE	MF01/PC05 Plus Postage.
DESCRIPTORS	*Battered Women; *Civil Rights; Court Judges; Court Litigation; Criminal Law; *Family Problems; Justice; *Law Enforcement; Legal Aid; *Legal Responsibility; Marriage Counseling; Police Community Relationship; *Social Action; Social Problems; Social Services; State Legislation

ABSTRACT

This report by the U.S. Commission on Civil Rights evaluates the treatment of adult women who are victims of domestic violence by the criminal and civil justice systems and by various service agencies. First, an overview of State domestic violence statutes and relief services is presented. The present responses and potential roles of police officers, prosecutors and judges are examined in subsequent chapters. In these chapters, the failure of police officers and judges to recognize the seriousness of domestic violence, and the tendency among prosecutors to treat such cases differently from those involving violence between strangers are discussed. The failure of judges to impose sanctions commensurate with the offense and their emphasis on preservation of the marital relationship at the expense of a battered woman's life and limb are also examined. The use of diversionary programs such as counseling and mediation which channel complaints out of the criminal justice system as well as the social services, shelters, and legal services available to battered women are also covered in this report. The final chapter reiterates the Commission's findings and sets forth recommendations for reform. (JCD)

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Under the Rule of Thumb

Battered Women and the Administration of Justice

A Report of the United States
Commission on Civil Rights

January 1982

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U.S. COMMISSION ON CIVIL RIGHTS

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- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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LETTER OF TRANSMITTAL

U.S. COMMISSION ON CIVIL RIGHTS
Washington, D.C.
January 1982

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

Sirs:

The United States Commission on Civil Rights transmits this report to you pursuant to Public Law 85-315, as amended.

Under the Rule of Thumb, a report on battered women and the administration of justice, is based on a 1978 Commission consultation held in Washington, D.C., as well as field studies and public hearings held in Phoenix, Arizona, and Harrisburg, Pennsylvania, in 1980. The report evaluates the treatment of women who are victims of domestic violence by the criminal and civil justice systems and by various social service agencies.

Although wife beating is a crime in every State, the law has often failed to protect these victims. The Commission's report reveals that at each stage of the criminal justice system a significant number of abused wives are turned away, with the result that few ever obtain relief. Police officers, prosecutors, and judges often fail to take appropriate action, treating spouse abuse not as a crime against society, but as a private family matter.

The report also finds that a woman who must flee her home to escape assault often has complex financial and emotional needs, served by inadequately supported social service programs, including shelters.

When the Commission's project was designed, the U.S. Law Enforcement Assistance Administration was funding many local projects on domestic violence within police departments and prosecutors' offices around the country. Many of the suggestions made by the Commission in this report were originally intended to be recommendations designed to facilitate the work of these projects under the auspices of LEAA. With the demise of that agency, however, much of the work remaining to be done in the area now rests squarely on the shoulders of State and local officials. In instances, however, where State and local officials fail to accept their responsibility, there may still be a need for more direct Federal involvement in this issue and the report contains the Commission's recommendations for such Federal action. The Commission is hopeful that the suggestions made in this report will assist local officials in coming to grips with a problem that has relegated too many women in this country to a status as second-class citizens in the eyes of the law.

Respectfully,

Arthur S. Flemming, *Chairman*
Mary F. Berry, *Vice Chairman*
Stephen Horn
Blandina Cardenas Ramirez
Jill S. Ruckelshaus
Murray Saltzman

John Hope III, *Acting Staff Director*

PREFACE

The Commission undertook this study of the problems of battered women in accordance with its legal mandate to "study and collect information" and to "appraise the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws. . .in the administration of justice."[1] Throughout its existence, the Commission has studied the treatment of various social groups by the justice system and assessed the consequences of the practices and policies of those involved in the administration of justice for both suspects and victims. While the Commission's recent report on police practices and the delivery of police services addressed issues of concern to all, this report focuses only on female victims and male abusers who are involved in incidents of physical violence while in a spousal relationship. It is the existence and extent of assaults of that nature as well as the treatment of both victim and abuser by the justice system that the Commission explored in this project.[2] In January 1978 the Commission sponsored a consultation on public policy issues affecting battered women. That consultation brought together nationally recognized experts in criminal justice, attorneys, victim advocates, and Federal officials for 2 days of discussion of the problem and alternatives for reform. Although speaking from a wide variety of backgrounds and perspectives on the problems of battered women, these experts were united by their conclusion that the legal system's response to women victims of domestic violence and their abusers differs markedly from its typical response to other assault victims and perpetrators. Numerous participants both within and outside the legal system described the policies and attitudes of police, prosecutors, and judges in such cases. They made it clear that domestic assault cases receive singular treatment by law enforcement officials and consistently evoke responses that are not found in other cases involving assaults between strangers or acquaintances. Although the category of "domestic violence" includes abuse against children, the elderly, and men, this report is concerned with evaluating the treatment of adult women who are victims of domestic violence by the criminal and civil justice systems and by various service agencies.

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[1] 42 U.S.C. §1975c (a)(2), (3) (Supp. III 1979).

[2] The Commission has been involved in the study of the problems of battered women for several years. In 1977 the Colorado Advisory Committee to the Commission published a report, *The Silent Victims: Denver's Battered Women;* the Connecticut Advisory Committee issued a report, *Battered Women in Hartford, Connecticut*, in 1979; and in 1980 the New Hampshire Advisory Committee published *Battered Women and the New Hampshire Justice System*. The New Jersey Advisory Committee's report, *Battered Women in New Jersey*, was published in January 1981, and the Maine Advisory Committee's report, *Maine's Domestic Violence Law Has Made a Good Beginning*, was prepared for release in October 1981.

For reasons undetermined in the context of this project, instances of abuse against adult women constituted the overwhelming majority of cases in the jurisdictions studied. Although it is true that husbands are sometimes the targets of spouse battering, this report focuses on female victims for several reasons. The incidence of abuse of women by men is much greater than the abuse of men by women. Women are, as a group, more likely to be economically dependent upon their spouses and therefore unable to escape an abusive relationship without protection from the legal system and support from various service organizations. Finally, the common law legacy of women as objects of property and as incompetents unable to conduct their own legal affairs continues to color the attitudes of police officers, prosecutors, and judges.

The project culminating in this report built upon the 1978 consultation. It was designed to elicit further information on the nature and extent of law enforcement practices that treat battered women differently from other assault victims. In the preparation of this report, Commission staff conducted field studies and hearings in Phoenix, Arizona, and Harrisburg, Pennsylvania. Phoenix was selected because Arizona was recognized as a State with a traditional criminal law approach in which battered wife cases are handled under laws available to all victims of violent crime; Harrisburg was selected because of Pennsylvania's attempts to institute reforms in the treatment of these cases.[8] The Phoenix hearings were held on February 12 and 13, 1980, and the Harrisburg hearings on June 17 and 18, 1980.

For the purposes of this report, the term "wife battering" is meant to include the battering of women by men with whom they have or have had an intimate relationship, whether or not legally married.

This project has addressed only physical abuse. Psychological or emotional abuse, while certainly serious and potentially damaging, is not usually treated as a criminal offense, and greater evidentiary problems are presented in investigating and proving psychological abuse.

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[8] Under the "Protection From Abuse Act," Pa. Stat. Ann. tit. 35 §§10181–90 (Purdon 1977) a person may seek relief for himself or herself or for a minor child by filing a petition with the court alleging abuse by the defendant. (*Id.* §10184) Within 10 days, a hearing is to be held at which the plaintiff must prove the allegation. (*Id.* §10185 (a)) The court may, in an *ex parte* proceeding, enter such temporary orders as it deems necessary to protect the plaintiff or minor children. (*Id.* §10185 (b)) Such orders, which are for a fixed period of time up to 1 year, may include directing the defendant to refrain from abusing the plaintiff or minor children, temporarily granting exclusive possession of the residence to the plaintiff, and awarding temporary custody of minor children. (*Id.* §10186) When the court is unavailable on weekends, district justices may issue such orders, effective until court reopens. (*Id.* §10188) A defendant who violates a protection order may be found in contempt. (*Id.* §10190).

ACKNOWLEDGMENTS

The Commission is indebted to the following staff members who participated in the preparation of this report under the supervision of Gail Gerebenics, Assistant General Counsel: Mary Anne Hoopes, Peggy Massey, Anne Meadows, Karen Primack, and Ricki Seidman, staff attorneys, and Linda Peyton,* legal intern.

The report is based on public hearings held in Phoenix, Arizona, under the direction of Jack Hartog and in Harrisburg, Pennsylvania, under the direction of Gail Gerebenics. Staff members participating in the field investigations and hearings included Laurie Campbell, Donald Chou, Mary Anne Hoopes, Linda Huber,* Peggy Massey, Anne Meadows, Robert Owens, Linda Peyton,* Ricki Seidman, Mary Grose, Connie Lee, DeBorah Marks,* and Grenda Morris.*

The Commission also expresses its appreciation to Brenda Blount, Mary Grose, Lorraine Jackson, Connie Lee and Michele Moree who provided support services necessary to the production of this report.

Final preparation of the report for publication was carried out by Vivian Hauser, Audree Holton, and Vivian Washington, Publications Support Center, Office of Management.

The field investigations and hearings were conducted under the overall supervision of Eileen M. Stein,* General Counsel. Production of the report was under the overall supervision of Paul Alexander, Acting General Counsel.

*No longer with the Commission.

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Chapter 1

Introduction

Conservative estimates put the number of battered wives in this country at well over a million,[1] while a recent publication estimates that there is spousal violence in close to one of every three marriages.[2] It is difficult to present an accurate picture of how many battered women there are, since data are sparse. Researchers in the area agree, however, that the extent of domestic violence is seriously underestimated; legal experts believe it to be one of the most underreported crimes in the country.[3]

According to one expert, the problem of wife abuse began "with the emergence of the first monogamous pairing relationship."[4] Women became their husbands' property and were completely subjugated:

> Although polygamy and infidelity remained men's privileges, the strictest fidelity was demanded of women, who became their husband's property. Women were confined to certain parts of the home, isolated, guarded, and restricted from public activity. A woman was duty bound to marry, satisfy her husband's lust, bear his children, and tend to his household. If a woman showed any signs of having a will of her own, the husband was expected by both church and state to chastise her for transgressions.[5]

By the Middle Ages, the subservient role of women was well established. Elizabeth Gould Davis points out in *The First Sex* that during this period "men were exhorted from the pulpit to beat their wives,"[6] and she cites an example from a medieval morality tale of the wickedness of a nagging wife and the proper punishment for such behavior:

> Here is an example to every good woman that she suffer and endure patiently, nor strive with her husband nor answer him before strangers, as did once a woman who did answer her husband before strangers with short words; and he smote her with his fist down to the earth; and then with his foot he struck her in her visage and broke her nose, and all her life after she had her nose crooked, the which so shent (spoiled) and disfigured her visage after, that she might not for shame show her face, it was so foul blemished. And this she had for her language that she was wont to say to her husband, and therefore the wife ought to suffer, and let the husband have the words, and to be master, for that is her duty.[7]

Between 1450 and 1481, Friar Cherubino of Siena compiled the *Rules of Marriage*, which prescribed:

> When you see your wife commit an offense, don't rush at her with insults and violent blows. . . .Scold her sharply, bully and terrify her. And if this still doesn't work. . .take up a stick and beat her soundly, for it is better to punish the body and correct the soul than to damage the soul and spare the body. . . .Then readily beat her, not in rage but out of charity and concern for her soul, so that the beating will redound to your merit and her good.[8]

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[1] Dolores J. Trent, "Wife Beating: A Psycho-Legal Analysis," *Case and Comment* (November-December 1979), p. 14 (hereafter cited as *Wife Beating*).

[2] Murray A. Straus, Richard J. Gelles, and Suzanne K. Steinmetz, *Behind Closed Doors: Violence in the American Family* (New York: Anchor Books, 1980), p. 32.

[3] *Wife Beating*, p. 14.

[4] Del Martin, statement, *Battered Women: Issues of Public Policy*, a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., Jan. 30-31, 1978, p. 5.

[5] Ibid., pp. 5–6.

[6] Elizabeth Gould Davis, *The First Sex* (Baltimore: Penguin Books, 1972), p. 252.

[7] Ibid., p. 254, quoting from a moral tale of medieval times as written by Geoffrey de la Tour de Landry in 1371.

[8] As quoted in Terry Davidson, *Conjugal Crime* (New York: Hawthorn Books, 1978), p. 99 (hereafter cited as *Conjugal Crime).*

Common law reflects the customs of the people of a nation,[9] and American law is built upon the British common law[10] that condoned wife beating and even prescribed the weapon to be used. This "rule of thumb" stipulated that a man could only beat his wife with a "rod not thicker than his thumb."[11] One British jurist, Sir William Blackstone, who wrote the *Commentaries on the Laws of England* that greatly influenced the making of the law in the American colonies, commented on the "rule of thumb":

> For, as [the husband] is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of chastisement, in the same moderation that a man is allowed to correct his apprentices or children. . . .[12]

In America, the British influence took hold, with different States enacting legislation that on the whole subscribed to the same basic philosophy. In 1824 the Mississippi Supreme Court in *Bradley v. State*[13] voiced approval of the husband's role as disciplinarian and stated its belief that the law should not disturb that role:

> Let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehaviour, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.[14]

As late as 1864 a North Carolina court, in a case in which a man choked his wife, upheld his use of force, commenting on the court's reluctance to "invade the domestic forum":

> [T]he law permits him to use towards his wife such a degree of force, as is necessary to control an unruly temper, and make her behave herself; and unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain. It prefers to leave the parties to themselves. . . .[15]

Finally, in 1871 an Alabama court rescinded the legal right of a man to beat his wife, holding that the husband and wife "stand upon the same footing before the law":

> The privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law. . . .[I]n person, the wife is entitled to the same protection of the law that the husband can invoke for himself. . . . All stand upon the same footing before the law "as citizens of Alabama, possessing equal civil and political rights and public privileges."[16]

In 1874 the North Carolina court also rescinded the man's legal right to beat his wife, but qualified the rescission, again hesitating to peer behind the domestic curtain:

> If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.[17]

In the late 1800s, some States tried to make wife beating illegal by passing laws against it. In Pennsylvania in 1886 a proposed bill would have made wife beating a crime, punishable by 30 lashes.[18] The bill did not pass in Pennsylvania, but one similar to it had passed in Maryland in 1882. The punishment in Maryland for wife beating was 40 lashes or a year in jail.[19] A district attorney in Baltimore observed, after the first man was punished under this law, that "the crime ceased as if by magic."[20] No American jurisdiction today legally permits a husband to strike his wife.

Despite the legal recognition of a woman's right to physical safety and of the State's duty to restrain and punish her assailant through the criminal process, evidence indicates that in many jurisdictions the laws available for the protection of all people do not protect a woman involved with her assailant in a prior or existing relationship.[21]

Experts in the area of domestic violence have reported that wives in America have been raped, choked, stabbed, shot, beaten, had their jaws and limbs broken, and have been struck with horse whips, pokers, bats, and bicycle chains.[22] Wife beating is found in every social class and at every income level,[23] regardless of race or education.

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[9] Ibid., p. 101.

[10] Ibid.

[11] Terry Davidson, "Wife Beating: A Recurring Phenomenon throughout History" in *Battered Women: A Psychological Study of Domestic Violence*, ed. Maria Roy (New York: Van Nostrand Reinhold, 1977), p. 18 (hereafter cited as "Wife Beating").

[12] Blackstone, *Commentaries on the Laws of England*, 1765, as quoted in "Wife Beating," p. 19.

[13] Bradley v. State, 1 Miss. 156 (1824).

[14] *Id.*

[15] State v. Black, 60 N.C. 262 (1 Win. 266) (1824).

[16] Fulgham v. State, 46 Ala. 146–47 (1871) (citations omitted).

[17] State v. Oliver, 70 N.C. 60, 61–62 (1874).

[18] As quoted in *Conjugal Crime*, p. 104.

[19] *Wife Beating*, p. 16.

[20] Ibid.

[21] See chapters 3, 4, and 5.

Many studies have been conducted on the causes and prevention of domestic violence. Alcohol and stress are often alleged to be the primary causes of wife battering. Experts working in the area of domestic violence take exception to this, maintaining that although alcohol and stress may play a significant role in the problem, they are not the cause, but rather an excuse:

> There are some cultures in the world that drink much more than we do but yet aren't violent. So it is a cultural problem. We want to look at the oncoming bad economic times. . .the poor men being out of jobs and all the stress that that will create and, therefore, they will beat their wives.
>
> Stress isn't the problem; it is something beyond that. It is culturally how we're brought up as men, that we can go home and we can beat our wives; they are our property and we can act violently, and until we examine that and avoid jumping to snap conclusions that alcohol is the problem or stress is the problem, we're not going to get anything done.[24]

Richard Gelles, a leading expert in the study of domestic violence, points out in his book *The Violent Home* that "[I]t might be argued that the definition of alcohol as an agent that causes out of character behavior is a definition that serves to justify that behavior by relieving the individual from responsibility for his actions."[25] He states further:

> Thus, individuals who wish to carry out a violent act become intoxicated *in order to carry out the act*. . . .Alcohol leads to violence. . .because it sets off primary conflict over drinking that can extend to arguments over spending money, cooking and sex. In these cases, drinking may serve as a trigger for long standing marital disputes and disagreements. . . .The existence of suitable and acceptable justifications for violence serves to normalize and neutralize the violence. These justifications also may play a causal role in family violence by providing, in advance, an excuse for behavior that is normally prohibited by societal and familial norms and standards.[26]

Another expert, in testimony at the Harrisburg hearing, discounted stress as a cause of wife abuse:

> [I]t is a very clear, cultural training with regard to power. Men in this culture, except in the rare situation of enlightened men, are in power relationships with women in which they have control and the ability to coerce. I think that once a man who is a batterer comes to grips with the facts that he has no right to exert power and coercion over his spouse, then change may come.
>
> It is not his impulses. Clearly, he doesn't beat up his boss. He doesn't beat up his secretary. He doesn't, you know, beat up the kids on the block. It is not impulses; it is a power relationship, and once he comes to grip with the impermissible and inequity of power in that relationship, and makes a conscious decision not to invoke his power by virtue of his size, by virtue of the culture, then change can occur, but not until that time.[27]

Whatever the causes, experts generally agree that violence is learned behavior. Many of the subjects in the Gelles study who had acted violently toward their spouses had witnessed violent behavior between their own parents as children and had themselves been beaten by their parents.[28] Mr. Gelles concluded:

> [V]iolence is learned behavior. . .[w]here an individual experiences violence as a child he is more likely to engage in violence as an adult. . . .When individuals do not experience violence in their families as they are growing up, they are less likely to be violent adults.[29]

A recent study of 2,143 American families also stresses the effects of growing up in a violent home:

> When a child grows up in a home where parents use lots of physical punishment and also hit each other, the chances of becoming a violent husband, wife, or parent are greatest of all: About one out of every four people who grew up in these most violent households use at least some physical force on their spouses in any one year. . .one out of ten of the husbands who grew up in violent families are wife-beaters in the sense of serious assault. This is over three times the rate for husbands who did not grow up in such violent homes.[30]

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[22] *Wife Beating*, p. 14.

[23] Straus, Gelles, and Steinmetz, *Behind Closed Doors*, p. 31.

[24] Stover Clark, testimony, *Hearing Before the U.S. Commission on Civil Rights, Harrisburg, Pennsylvania*, June 17–18, 1980 (hereafter cited as *Harrisburg Hearing*), p. 220.

[25] Richard J. Gelles, *The Violent Home* (Beverly Hills: Sage Publications, 1972), pp. 116–17.

[26] Ibid., pp. 117–18.

[27] Barbara Hart, testimony, *Harrisburg Hearing*, p. 16.

[28] Gelles, *Violent Home*, pp. 169–70.

[29] Ibid., pp. 181.

[30] Straus, Gelles, and Steinmetz, *Behind Closed Doors*, p. 122. According to Dr. Barbara Star, a researcher on family violence in Los Angeles, "People who work with violent families are impressed by the amount of distance, both emotional and physical, they see between family members. It is as if each person lived in his or her own world. They may share the same house but they do not know each other well. Their conversations are more about things than about inner thoughts or feelings. It is a very

This report will examine the present and potential roles of those who make up our justice system—the police, prosecutors, and judges—in spouse abuse cases. Chapter 3 addresses police response to cases of domestic violence and the failure of many police departments and officers to recognize the seriousness of the offense and to take appropriate police action based not upon the relationship between assailant and victim, but upon the crime that has been committed. Chapter 4 discusses the widespread prosecutorial practice of treating complaints of spousal violence differently from complaints involving similar violence between strangers, of erecting barriers to their successful prosecution, and of discouraging battered women from pursuing criminal complaints. Chapter 5 examines the failure of judges to impose sanctions on abusive spouses commensurate with the seriousness of the offense, as well as their emphasis on the preservation of the marital relationship at the expense of a battered wife's life and limb.

Chapter 6 addresses the use of diversionary programs such as counseling and mediation, through which complaints of criminal behavior are channeled away from the traditional criminal process.

The various components of the justice system and the social service delivery system are, of course, related. A woman who must flee her home to escape assault is often without her own resources and often is financially, as well as emotionally, bound to her assailant. Her complex needs must be met by a wide array of services. Chapter 7 discusses the extent to which shelters and social services provide support necessary for a woman with inadequate resources to make use of alternatives and remedies available through the justice system. The role of legal services is also examined, for legal advocacy is usually crucial to a woman seeking civil remedies such as divorce, orders for support, and orders restraining her spouse from further abusive conduct.

Each chapter concludes with the Commission's findings. Alleviation of the tragic, age-old problem of wife abuse may depend on the responsive actions taken by members of the executive, legislative, and judicial branches of government on all levels—Federal, State, and local. The final chapter of the report reiterates the findings and sets forth the Commission's recommendations and suggestions for reform.

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empty existence." Barbara Star, "The Impact of Violence on Families," scheduled for publication in *Conciliation Courts Review*, vol. 19. no. 2 (December 1981), p. 4 of manuscript. The result of this is that "[f]amilies that fight together, break up. That is the ultimate impact of violence on families. It literally [destroys] the family as a unit. Violence may contribute to the dissolution of one-third of the marriages [that] end in divorce." Ibid., pp. 8–9 (footnote omitted).

Chapter 2

The Law

This chapter is intended to provide an overview and does not include an exhaustive list of State domestic violence statutes or all possible forms of relief available to women who are victims of domestic violence. Civil and criminal statutes pertaining to domestic violence vary from State to State and provide different degrees of relief for victims. The various statutes applicable to victims of violent crime are not necessarily available to victims of violence in their homes. As of 1980, however, approximately 38 State legislatures had amended or were considering amending statutes to provide additional relief for victims of domestic violence.[1]

Civil Relief

The most common form of immediate civil (noncriminal) relief now being enacted to deal with domestic violence is the injunction, a court order to do something or to refrain from doing something. This civil remedy for injured parties is usually called a restraining order or protective order, depending on the State.[2] These orders typically contain provisions directing the defendant to refrain from abusing the plaintiff or the minor children.[3] Most State statutes attempt to define abuse, as in Pennsylvania, where abuse is defined as:

> the occurrence of one or more of the following acts between family or household members: attempting to cause or intentionally, knowingly, or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon; placing by physical menace another in fear of imminent bodily injury; sexually abusing minor children.[4]

Other States define domestic violence or abuse as: attempting to cause or recklessly causing bodily injury or placing another person by the threat of force in fear of imminent serious physical harm;[5] intentionally or recklessly causing or attempting to cause bodily injury;[6] causing another to engage involuntarily in sexual relations by force, threat, or force or duress;[7] or the "physical injury, sexual abuse or forced imprisonment of a person by another. . .to the extent that the person's health or welfare is harmed or threatened thereby."[8]

Civil protection orders vary in scope. Although the most common relief provided is an injunction ordering the defendant to refrain from abusing the victim, protection orders often exclude the defendant from the residence or household. In Minnesota, the defendant may be excluded from a home the parties share or from the plaintiff's residence if the parties do not live together.[9] In Pennsylvania, even if the residence is jointly owned or leased, the plaintiff may have the defendant excluded.[10] New York State, however, will exclude an abusive mate only if the parties are married.[11] In Texas, even where the residence is owned or leased by the defendant, the court will exclude him from the home, but only if he has an obligation to support the party granted possession of the residence or a child of the party granted possession.[12]

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[1] U.S., Department of Health and Human Services, *State Domestic Violence Laws and How To Pass Them: A Manual for Lobbyists*, by Julie E. Hamos (1980), p. 15 (hereafter cited as *Domestic Violence Laws).*

[2] Ibid.

[3] Ibid., p. 20; Pa. Stat. Ann. tit. 35, §10186(a)(1) (Purdon 1978).

[4] *Domestic Violence Laws*, p. 19; Pa. Stat. Ann. tit. 35, §10182 (Purdon 1978).

[5] Ohio Rev. Code Ann. §3113.31(A)(1)(a)(b) (Page 1979).

[6] Cal. Civ. Proc. Code §542(a) (West Supp. 1981).

[7] Mass. Gen. Laws Ann. ch. 209A, §1(c) (West Supp. 1981).

[8] Or. Rev. Stat. §184.885(2) (1977).

[9] Minn. Stat. Ann. §518B.01(6)(b) (West Supp. 1981).

Other forms of relief available under protection orders are provisions that the defendant refrain from entering the residence, school, business, or place of employment of the plaintiff;[13] that the defendant make support payments to the plaintiff and minor children;[14] that the defendant and/or plaintiff receive professional counseling;[15] that the defendant pay restitution to the plaintiff for losses suffered as a direct result of the abuse;[16] and that the defendant pay medical expenses incurred by the plaintiff as a result of the domestic violence.[17]

These avenues of relief are not, as a matter of course, extended to everyone involved in domestic violence. The party eligible for relief, such as the family or household member, is normally defined in the statute.[18] In Pennsylvania, this consists of spouses, persons living as spouses, parents and children, or other persons related by consanguinity or affinity.[19] The Pennsylvania statute will only cover former coresidents if both parties continue to have legal access to the residence.[20] In Minnesota, family or household member means spouses, parents and children, persons related by consanguinity, and persons jointly residing in the same dwelling unit.[21]

The language of most statutes is usually vague in defining "living as spouses and cohabitant," thus making it difficult to interpret who is eligible for protection. Whether this would include unmarried persons or only those living together in an intimate relationship remains open to interpretation in some States. Some jurisdictions specifically state that their protection orders will cover individuals cohabitating. The State of Washington, for example, defines a cohabitant as:

> a person who is married or who is cohabiting with a person as husband and wife at the present time or at some time in the past. Any person who has one or more children in common with another person, regardless of whether they have been married or lived together at any time, shall be treated as a cohabitant.[22]

Wisconsin is even more explicit, stating:

> "Spousal relationship" means either a marital relationship or two persons of the opposite sex who share one place or abode with minor children and live together in a relationship which is similar to a marital relationship except that the two persons are not married to each other. . . .[23]

The District of Columbia has a broad definition of who is protected, extending eligibility to unmarried couples if: "he shares a mutual residence and is in a close relationship,"[24] as does Missouri, which provides protection to "spouses, persons related by blood or marriage, and other persons of the opposite sex jointly residing in the same dwelling unit."[25]

Many States provide preliminary protection orders to be issued *ex parte*[26] in the face of "immediate or present danger of abuse."[27] Such orders usually are effective until a hearing can be held, generally within 10 days.[28] In Pennsylvania, an *ex parte* order can remain in effect for as long as a year if the defendant eludes notice and the hearing.[29] Ohio also provides for an *ex parte* criminal protection order and requires a hearing within 24 hours of the order.[30]

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[10] Pa. Stat. Ann. tit. 35, §1018b(a)(2) (Purdon 1978).

[11] N.Y. Jud. Law §812 (N.5) (McKinney, 1975).

[12] Tex. Fam. Code Ann. tit. 4, §71.11 (Vernon Supp. 1980–81).

[13] Ohio Rev. Code Ann. §3113.31(E)(1)(g) (1979).

[14] Iowa Code Ann. §236.5(1) (West Supp. 1980–81).

[15] Ill. Ann. Stat. ch. 69, §25 (Smith-Hurd Supp. 1980–81).

[16] Mass. Gen. Laws Ann. ch. 209A, §3(e) (West Supp. 1981).

[17] Alaska Stat. §09.55.610(6) (Supp. 1980).

[18] *Domestic Violence Laws*, p. 16.

[19] Pa. Stat. Ann. tit. 35, §10182 (Purdon 1978).

[20] *Domestic Violence Laws*, p. 16; Pa. Stat. Ann. tit. 35, §10182 (Purdon 1978).

[21] Minn. Stat. Ann. §518B(2)(b) (West Supp. 1981).

[22] Wash. Rev. Code Ann. §10.99.020(1) (West 1980).

[23] Wis. Stat. Ann. §46.95(c) (West Supp. 1980–81).

[24] D.C. Code Ann. §16–1001(1)(c) (1973).

[25] Mo. Ann. Stat. §455.010(b), 455.020 (Vernon Supp. 1981).

[26] *Domestic Violence Laws*, p. 21. A judicial proceeding, order, injunction, etc., is said to be *ex parte* when it is taken or granted at the instance and for the benefit of one party only, and without notice to or contestation by any person adversely interested. (Black's Law Dictionary (5th ed. 1979).) The issuance of *ex parte* orders granting exclusive possession of the home to an abused spouse has raised constitutional issues that have become a source of dispute and litigation. For a discussion of the constitutional issues, see chap. 5.

[27] Pa. Stat. Ann. tit. 35, §10188(a) (Purdon 1978).

[28] *Domestic Violence Laws*, p. 21.

[29] Ibid.

[30] Legal Services Corporation, *Adult Domestic Violence: Constitutional, Legislative and Equitable Issues*, by Ann-Marie Boylan and Nadine Taub (1981), p. 76 (hereafter cited as *Adult Domestic Violence)*.

If a protection order is granted, the duration of the order will vary from State to State. A year is a common time limit imposed.[31] Massachusetts allows an order to be extended if deemed necessary to protect the victim.[32] West Virginia has a 30-day maximum time limit on protection orders.[33]

After a protection order is issued, enforcement becomes an issue. Violation of an injunction usually constitutes contempt of court, punishable by fine or imprisonment.[34] Most statutes do not specify whether a violation is civil or criminal contempt, but in the language of some statutes criminal contempt is implied.[35] In West Virginia, a sentence may include 30 days in jail and/or a $1,000 fine for contempt;[36] Iowa prescribes a jail sentence for contempt;[37] and Minnesota has made violation of a protection order a misdemeanor.[38] Pennsylvania's Protection From Abuse Act was amended in 1978 to create "indirect criminal contempt," with a penalty of up to 6 months in jail and a fine not to exceed $1,000, or both.[39] Pennsylvania's act also provides for warrantless arrest upon a showing that the police have probable cause to believe a protection order has been violated:

> An arrest for violation of an order issued pursuant to this act may be without warrant upon probable cause whether or not the violation is committed in the presence of the police officer.[40]

A legal services attorney evaluated the Protection From Abuse Act at the Harrisburg hearing:

> MS. ROURKE. The act is an immense improvement over what we used to have. There are still problems with it. There are still areas that need to be improved and there are problems outside the act. . .[but] [i]t gives us relief in cases where there was just absolutely no other choice before. Before the shelter was in existence and before the act was passed, I had one particular client tell me that the reason she killed her husband was because there wasn't anyplace to go and there wasn't any protection she could get. The police wouldn't get involved and he attacked her, and she had no chance. She killed him, and it was found to be justifiable homicide. She told me, if either the act or the shelter existed, he would still be alive and they probably would be apart and there wouldn't be the problem.
>
> The act itself—the most serious problems I see with it now are the questions about jurisdiction and venue. The problems about where do you file a protective order if the party—if the abuse took place in one county and the parties are now living in another county, where do you file? Also, if you want to enforce it intercounty. If you have a protective order in Harrisburg and the people are shopping across the river in Camp Hill, and the guy finds the woman out in a shopping center and attacks her, how do you verify the existence of the protective order? How do you get the police to make an arrest? How do you get prosecution commenced? Do you file it in Cumberland County? Do you file it in Dauphin County?. . .There's just some real serious problems.[41]

Another legal services attorney thought that the problems inherent in the present Protection From Abuse Act were curable through rules, noting:

> I think that the law itself has helped a lot. I think that over the course of time when one person responds, whether it be a police officer or a judge in a particular case, that has an effect on all the other people in the system, and. . .I think the law in itself is causing some changes in people's attitudes.[42]

Approximately 15 States have criminalized violation of a protection order by making such an infraction a misdemeanor.[43] Hawaii provides that: "[a]ny willful disobedience of a temporary restraining order. . .shall be a misdemeanor, and any other disobedience of a restraining order may be treated by the court as a civil contempt."[44] Similarly, in Texas a violation of an order "by commissions of family violence may be a criminal offense punishable by a fine of as much as $2,000 or by confinement in jail for as long as one year, or both."[45] Violation of a protection order does not automatically mean that any sanction, civil or criminal, will be imposed. These sanctions are widely discretionary with the judges, and often violators will be given another chance, or they are diverted away from the criminal system into programs requiring some form of counseling or therapy.

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[31] Ibid., p. 83; Or. Rev. Stat. §107.715(2) (1977); Pa. Stat. Ann. tit. 35, §10186(b) (Purdon 1978); Mass. Gen. Laws Ann. ch. 209A, §3(e) (West Supp. 1981).

[32] Mass. Gen. Laws Ann. ch. 209A §3(e) (West Supp. 1981).

[33] W. Va. Code §48-2A-6(2) (1980).

[34] *Domestic Violence Laws*, p. 25.

[35] *Adult Domestic Violence*, p. 125.

[36] Ibid.; W. Va. Code §48-2A-7(2) (1980).

[37] Iowa Code Ann. §236.8 (West Supp. 1980-81).

[38] Minn. Stat. Ann. §518.B.01(14) (West Supp. 1981).

[39] *Domestic Violence Laws*, p. 26; Pa. Stat. Ann. tit. 35, §10190(a)-(b) (Purdon 1978).

[40] Pa. Stat. Ann. tit. 35, §10190(c) (Purdon 1978).

[41] Nancy E. Rourke, testimony, *Hearing Before the U.S. Commission on Civil Rights, Harrisburg, Pennsylvania*, June 17–18, 1980 (hereafter cited as *Harrisburg Hearing)*, p. 149.

[42] Lawrence Norton, testimony, *Harrisburg Hearing*, pp. 152–53.

[43] *Response*, vol. 3, no. 12 (August/September 1980, Center for Women Policy Studies), pp. 6–7.

[44] *Adult Domestic Violence*, p. 132; Hawaii Rev. Stat. §585–4 (Supp. 1980).

[45] *Domestic Violence Laws*, p. 29; Tex. Fam. Code Ann. tit. 4, §71.16(b) (Vernon Supp. 1980–81).

In addition to or in place of a protection order, women who are victims of domestic violence often seek some other form of civil relief. Some States still maintain "interspousal tort immunity," which prevents a battered woman from suing her spouse in a civil suit.[46] Most States have abolished this immunity with respect to torts against property interests; in many States, however, spouses still cannot sue one another for personal assaults.[47] New York abolished interspousal immunity, stating:

> A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in personal injury. . .or resulting in injury to her property, as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts resulting in any such personal injury to her husband or his property, as if they were unmarried.[48]

A remedy in tort action is often not available for lower income women because either they lack the financial resources to pursue it or they would not gain from it because their spouses are also without resources.

Legislation providing other forms of protection for abused women and creating civil remedies for victims of domestic violence is becoming more common. Most marriage dissolution statutes provide some injunctive relief to protect the spouse during divorce proceedings. In Arizona the standard preliminary injunction granted in actions for dissolution or legal separation states: "both parties are enjoined from molesting, harassing, disturbing the peace of or committing an assault or battery on the person of the other party or any natural or adopted child."[49]

Legislation creating a defense to grounds of desertion when a woman leaves a battering situation has been found to be necessary by some States.[50] Most States have instituted no-fault divorce laws, but a few still require proof of grounds for a divorce.[51] Desertion may be grounds for divorce in those States that grant divorce based on the fault of one party.[52] A woman who leaves an abusive situation may be found to have deserted her husband and, therefore, may become the party at fault. In New Jersey the courts have held that when a woman is forced to leave her marital home due to the extreme cruelty of her mate, constructive desertion on her mate's part has occurred, and this may be grounds for her to file for divorce.[53] In addition, New Jersey courts have held that when a wife leaves her marital home because of the misconduct of the husband, desertion cannot be made the grounds of divorce should the husband proceed with a divorce action and cannot be used as his defense to her action for divorce.[54]

Another remedy available to abused women in some States is crime victims' compensation. Washington State has such legislation, but excludes coverage of women who are still living in the same household with their abusive spouse.[55]

Criminal Prosecution

In most States a battered woman has the legal right to pursue a criminal complaint against her abusive mate under existing criminal statutes. Relevant criminal offenses typically include assault, battery, aggravated assault, aggravated battery, reckless conduct, intimidation, disorderly conduct, or harassment.[56] For various reasons, these remedies are not always available to abused women, and thus some States have codified domestic violence as a specific form of criminal behavior.

Under the traditional criminal remedy, battered women often find themselves confronted with inaction by police officers, consistent filing of less serious charges by prosecutors because of the family nature of the matter, and the view of many criminal justice officials that violence in the home is less serious than violence among strangers. New domestic violence criminal legislation attempts to remedy this.

Criminal statutes directed at domestic violence vary from State to State. The Arkansas criminal code defines three degrees of wife battering and four degrees of assault on a wife.[57] This statute only protects women and is identical to the general assault statute, except that certain language changes have been made to focus on battered wives. California's domestic violence statute extends coverage to cohabitants of the opposite sex and states that an abusive mate can be imprisoned in the State penitentiary for 2 to 4 years or in the county jail for a year for willful "corporal injury resulting in a traumatic condition."[58] Identical to its assault and battery statute, the Tennessee domestic violence statute limits the charge that can be brought in a domestic situation to a misdemeanor.[59] Ohio has similar legislation, but where the assault is a repeat offense, the charge can be a fourth-degree felony,[60] the maximum penalty for which is 5 years.[61]

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[46] *Domestic Violence Laws*, p. 31.

[47] Ibid., p. 32.

[48] Ibid.; N.Y. Gen. Oblig. Law §3-313(1)-(2) (McKinney 1978).

[49] Ariz. Rev. Stat. Ann. §25-315(A)(l)(b) (Supp. 1979).

[50] *Domestic Violence Laws*, p. 34.

[51] Ibid., p. 33.

[52] Ibid.

[53] Fitzgerald v. Fitzgerald, 66 N.J. Super. 277, 168 A.2d 851 (1961).

[54] Meldowney v. Meldowney, 27 N.J. Eq. 328 (1876); Taylor v. Taylor, 28 N.J. Eq. 207 (1877).

[55] Wash. Rev. Code §7.68.070(3)(b) (Supp. 1981).

[56] *Domestic Violence Laws*, p. 36.

[57] Ibid., p. 37; Ark. Stat. Ann. §§41-1653 to 1659 (Supp. 1981).

Most laws that are codified to punish domestic violence do not address the issue of marital rape, and many States still have a marital exception to rape laws, preventing a man from being charged for raping his spouse. New Jersey, Oregon, and Nebraska have eliminated this marital exception from their codes.[62] The New Jersey Penal Code states: "[N]o actor shall be presumed to be incapable of committing a [sexual] crime because of. . .marriage to the victim."[63] California, although not completely eliminating the spousal exception, has established a separate crime of spousal rape,[64] which requires that the victim report the offense within 30 days to initiate arrest or prosecution.[65]

Lack of enforcement, including a reluctance to arrest in cases of domestic violence, is a continuing problem. Courts in some States are required by law to direct law enforcement agencies to enforce protection orders.[66] Ohio specifies that officers "shall enforce the order. . .in accordance with the provisions contained in the order including removing the respondent from the premises where appropriate."[67] North Dakota has established that:

> When an [protection] order is issued upon request of the applicant. . .the court shall order the sheriff or other appropriate law enforcement officer to accompany the applicant and assist in placing the applicant in possession of the dwelling or residence, or otherwise assist in execution or service of the protection order.[68]

Similar provisions are found in the Massachusetts statute, which states:

> whenever any law officer has reason to believe that a family or household member has been abused, that officer shall use all reasonable means to prevent further abuse including: (1) remaining on the scene;. . . (2) . . .driving the victim to the hospital; (3) giving [victim]. . .notice of [her] rights; (4) arresting. . .if the officer has probable cause to believe that a felony has been committed, or a misdemeanor has been committed in the officer's presence. . . .[69]

In most States, police may make an arrest only if they have probable cause to believe a felony has been committed or if they witness the commission of a misdemeanor.[70] Recent domestic violence legislation has attempted to make it easier for reluctant officers to make arrests in cases of domestic violence.

Authority to arrest for violations of protection orders may be distinguished from authority to arrest for the commission of a felony or misdemeanor. As to the former, Oregon makes it mandatory, unless the victim objects, that an officer make a warrantless arrest when there is probable cause to believe that a protection order has been violated.[71] In North Carolina, the statute provides that the police shall:

> take a person into custody if the officer has probable cause to believe that the person has violated a court order excluding the person from the residence or household occupied by a victim of domestic violence or directing the person to refrain from harassing or interfering with the victim, and if the victim presents the law enforcement officer with a copy of the order or the officer determines that such an order exists through phone, radio or other communication with appropriate authorities.[72]

Some States prohibit warrantless arrests for misdemeanors committed out of the presence of a police officer, but new domestic violence legislation is now changing this. A statute that reflects this change is found in Florida:

> [a] peace officer may arrest a person without a warrant when. . . .The officer has probable cause to believe that

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[58] Cal. Penal Code §273.5 (West Supp. 1981).

[59] *Domestic Violence Laws*, p. 37; Tenn. Code Ann. §39–602 (Supp. 1980).

[60] *Domestic Violence Laws*, p. 37; Ohio Rev. Code Ann. §2919.25(c) (Page 1979).

[61] Ohio Rev. Code Ann. §2929.11(B)(4) (Page 1979).

[62] Joanne Schulman, "The Marital Rape Exemption in the Criminal Law," *Clearinghouse Review*, vol. 14, no. 6 (October 1980), pp. 538–40.

[63] Ibid., N.J. Stat. Ann. §2C–14–5(b) (West 1981).

[64] Cal. Penal Code §262 (West Supp. 1981).

[65] Cal. Penal Code §262(b) (West Supp. 1981).

[66] *Adult Domestic Violence*, p. 187.

[67] Ohio Rev. Code Ann. §3113.31(F) (Page 1979).

[68] N.D. Cent. Code §1407.1–04 (Supp. 1979).

[69] Mass. Gen. Laws Ann. ch. 209A, §6 (West Supp. 1981).

[70] *Domestic Violence Laws*, p. 38.

[71] Or. Rev. Stat. §133.055 (1977).

[72] N.C. Gen. Stat. §50B–4(b) (Supp. 1979).

> the person has committed a battery upon the person's spouse and the officer: (a) finds evidence of bodily harm; or (b) the officer reasonably believes that there is danger of violence unless the person alleged to have committed the battery is arrested without delay.[73]

Ohio has enacted legislation that allows police officers to make a warrantless arrest on a written statement of the victim:

> The execution of a written statement by a person alleging that an alleged offender has committed the offense of domestic violence against the person or against a child of the person, constitutes reasonable ground to believe that the offense was committed and reasonable cause to believe that the person alleged to have committed the offense is guilty of the violation.[74]

Along with addressing police enforcement and arrest in domestic violence situations, legislation related to police immunity from civil or criminal damages has also been implemented in some States. Many States have now enacted provisions protecting police officers who enforce domestic violence statutes from civil and/or criminal liability in any subsequent legal action.[75] In Oregon, police officers have civil and criminal immunity from liability for making an arrest, if it is made in good faith and in the absence of malice.[76]

Beyond making the laws more flexible, attitudes and conventional beliefs about the use of force against a spouse must also change. Police officers often carry these attitudes to their jobs, affecting their judgment in dealing with domestic disputes. In response, groups active in the area of domestic violence are assisting in police training in order to sensitize law enforcement officials to the dilemma of an abused woman. Alaska has passed a rather detailed law requiring the established police training program to provide training that acquaints officers with the laws and criminal procedure applicable in domestic violence cases, techniques for handling domestic violence, resources available to victims of domestic violence, and the notification that must be given victims regarding their rights and remedies.[77]

Miscellaneous Laws

Legislation related to domestic violence is not directed exclusively at civil and criminal remedies. States are now passing legislation that will offer aid and services to promote the eventual reduction of the incidence of domestic violence.

Grassroots groups and agencies working in the area of domestic violence have long recognized the necessity of safe houses. State legislatures are now also recognizing this need, and laws on the establishment and maintenance of shelters are being developed. Washington State, in its legislative findings, points out:

> Shelters for victims of domestic violence are essential to provide protection to victims from further abuse and physical harm and to help the victim in finding long-range alternative living situations, if requested. Shelters provide safety, refuge, advocacy, and helping resources to victims who may not have access to such things if they remain in abusive situations. The legislature therefore recognizes the need for state-wide development and expansion of shelters for victims of domestic violence.[78]

In accordance with these findings, Washington State provided legislation for shelters to house the victims of domestic violence,[79] and other States have followed suit. Virginia has mandated that the department of welfare shall have the responsibility to: "act as the administering agent for State grant funds for community groups seeking to establish service programs for victims of spouse abuse."[80] New Jersey has also provided shelters for victims of domestic violence and has established guidelines for services to battered women, including emergency medical care, legal aid, counseling, and information on education, jobs, housing, and available social services. New Jersey's statute also provides that one or more shelter personnel be bilingual whenever feasible.[81]

Data-collection laws are also being enacted. The incidence of domestic violence has never been adequately documented. This is, in part, due to lack of reporting by victims. The major problem, however, has been sparse data collection by law enforcement and direct service agencies. Maine has codified the necessity to "provide for the collection of data concerning domestic abuse in an effort to develop a comprehensive analysis of the incidence and causes of that abuse."[82] Similarly, Michigan requires that the chiefs of police and sheriffs of villages, townships, and counties report to the State police department the number of assaults reported involving spouses and the disposition of the cases.[83] New Hampshire requires the State police director to submit an annual report to the general court on the number of assaults on family or household members.[84]

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[73] Fla. Stat. Ann. 901.15(b) (West Supp. 1981).

[74] Ohio Rev. Code Ann. §2935.03(B) (Page 1979).

[75] *Domestic Violence Laws*, p. 48.

[76] Or. Rev. Stat. §133.315 (1977); see also Iowa Code Ann. §236.11 (West Supp. 1980–81).

[77] Alaska Stat. §18.65.510 (Supp. 1980).

[78] Wash. Rev. Code Ann. §70.124 (West Supp. 1981).

[79] *Id.*

[80] Va. Code §63.1–317(5) (1980).

[81] N.J. Stat. Ann. §30:14–1 to 14–14 (West 1981).

Even after police respond to domestic violence calls, the victims of abuse are often left in the residence without any knowledge of what their rights or remedies might be. State legislation is now being enacted to remedy this. Massachusetts requires that officers arriving at the scene of a domestic dispute stay at the scene until the danger has passed, help the victim to obtain medical treatment, arrest if probable cause exists, and give the victim notice of her rights. This written notice is to be in English and Spanish, and handed to the victim:

> You have the right to go to the district, probate or superior court and file a complaint requesting any of the following applicable orders for temporary relief: (a) an order restraining your attacker from abusing you; (b) an order directing your attacker to leave your household; (c) an order awarding you custody of a minor child; (d) an order directing your attacker to pay support for you or any minor child in your custody if the attacker has a legal obligation to support them; and (e) an order directing your attacker to pay you for losses suffered as a result of the abuse, including medical and moving expenses, loss of earnings or support, attorney fees and other out-of-pocket losses for injuries sustained.
>
> You have the right to go to district court and file a criminal complaint for threats, assault and battery, assault with a deadly weapon, assault with intent to kill or other related crimes. You may go to district court for an emergency on weekends or holidays.
>
> If you are in need of medical treatment, you have the right to demand that the officer present drive you to the nearest hospital or otherwise assist you.
>
> If you believe that police protection is needed for your physical safety, you have the right to demand that the officer present remain at the scene until you and your children can leave or until your safety is otherwise insured.[85]

Other legislative attempts to reduce the incidence of domestic violence include legislation requiring the court to forward a copy of protection orders when issued;[86] requiring county clerks to help women filing for protection orders by providing forms and assistance in preparing and serving the documents;[87] providing that, in cases of domestic violence, husband and wives are competent witnesses and cannot refuse to testify on the ground of the privileged nature of their communications;[88] providing that the court cannot, in considering custodial rights, consider abandonment of the family residence when the abandoning party left due to physical harm or the serious threat of physical harm;[89] and providing for special diversion programs that will necessitate counseling and treatment for the abuser.[90]

An important aspect of some domestic violence statutes is a provision that a woman who is seeking a protection order is not precluded from also seeking relief through the criminal process. Although in the District of Columbia the United States attorney cannot file criminal charges once the family division begins taking evidence toward seeking a protection order,[91] other State statutes specifically establish that a woman seeking relief under a protection from abuse act shall not be precluded from seeking other criminal or civil relief.[92]

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[82] Me. Rev. Stat. Ann. tit. 19, §761(3) (Supp. 1980–81).

[83] Mich. Comp. Laws Ann. §28.257(7)(d) (Supp. 1980–81).

[84] N.H. Rev. Stat. Ann. §106–B14(II) (Supp. 1979).

[85] Mass. Gen Laws Ann. ch. 209A §6 (West Supp. 1981); see also Utah Code Ann. §30–6–8 (Supp. 1979).

[86] Minn. Stat. Ann. §518B.01(13) (West Supp. 1981).

[87] Utah Code Ann. §30–6–4 (Supp. 1979); Mo. Ann. Stat. §455.025 (Vernon Supp. 1981).

[88] W. Va. Code §48–2A–8 (1980).

[89] Me. Rev. Stat. Ann. tit. 19, §211 (West Supp. 1980–81).

[90] Cal. Penal Code §1000.6 (West Supp. 1981).

[91] D.C. Code Ann. §16–1002(b) (1973).

[92] Minn. Stat. Ann. §18B.01(16) (West Supp. 1981); N.C. Gen. Stat. §50B–7 (Supp. 1979); Conn. Gen. Stat. Ann. §66–38(e) (West Supp. 1981).

Chapter 3

The Police

Although a victim of domestic violence in some jurisdictions may file a private criminal complaint or seek civil relief, in the vast majority of cases a police officer is the first representative of the justice system with whom a battered woman has any contact.

Victims of domestic violence call upon the police for help in great numbers. Police officials estimate that domestic disturbance calls constitute between 15 and 40 percent of all calls for police assistance.[1] If the police fail to respond to her calls or respond slowly, or if they fail to take appropriate action against her assailant or express sympathy for him, the victim receives a clear message that she cannot depend on the justice system for protection. The impressions gained from interaction with police officers, especially if they are confirmed after several police visits, may discourage victims from continuing to seek assistance through the criminal process.

The responsiveness of law enforcement agencies in domestic violence cases has not always been an issue in the United States. English common law and the early law of many American States expressly endorsed the right of a husband to punish his wife physically. The underlying theory was that since the husband in many cases was held responsible for the wife's actions, he should be permitted to chastise and restrain her with the use of moderate physical force.[2] Even after American courts disavowed this theory at the end of the 19th century, law and social custom continued to treat spousal assaults as private family matters best resolved by the parties without resort to criminal sanctions.[3]

Police practices reflected the prevailing social and legal approach. The author of a recent report on police and domestic violence notes:

> [P]olice rarely made an arrest in family violence situations and they had no special skills with which to handle such disputes, except to use authoritarian gestures or commands telling the participants to "break it up" or "take a walk." For the most part, this lack of preparation to deal with domestic violence can be traced to the relatively recent entry of police into these situations, many of which were previously settled through the intervention of relatives or neighbors.[4]

Even today, when the illegality of spouse abuse is settled beyond doubt, some police officers continue to view domestic violence as a quasi-criminal problem only peripherally related to law enforcement. One officer explained this attitude:

> The police officer responds to the domestic problem. He is seeing an outcropping of a much more deep-seated problem. He only confronts. . .the tip of the whip that cracks. And yet the whole whip is there. . . .It's a police

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[1] Elizabeth Connick, Jan Chytilo, and Andresa Person, "Battered Women and the New York City Criminal Justice System" (paper delivered at the 1980 Annual Meeting of the Law and Society Association and the Institute for Social Analysis Research Committee on Sociology of Law, Madison, Wis., June 5–8, 1980), p. 1; Asst. Chief Donald Lozier, testimony, *Hearing Before the U.S. Commission on Civil Rights, Phoenix, Arizona,* Feb. 12–13, 1980 (hereafter cited as *Phoenix Hearing*), p. 57.

[2] See cases collected in Sue E. Eisenberg and Patricia L. Micklow, "The Assaulted Wife: 'Catch 22' Revisited," *Women's Rights Law Reporter,* vol. 3 (1976), pp. 138, 139.

[3] Ibid.

[4] Nancy Loving, *Responding to Spouse Abuse and Wife Beating* (Police Executive Research Forum, 1980), p. 33.

problem when we deal with it but the cause is not a police problem.[5]

Police officers often view domestic disturbance calls as dangerous, emotionally charged, and difficult to resolve. A Phoenix police supervisor summed up his officers' attitudes toward domestic disturbance calls:

> The police officer, basically, by and large, does not like answering domestic calls of that nature. . . .When he receives the call by radio. . .[t]he two things he feels [are] probably fear, because more officers are killed in family situations than probably anything else, and the other thing is frustration.[6]

Police officers are acutely aware of the danger to themselves that intervention in domestic disturbances may entail. Witnesses at the Commission's hearings repeatedly emphasized the danger of such calls.[7] Training materials for police officers also traditionally stress the importance of being alert to the possibility of attack by either the suspect or the victim.[8]

Due to current recordkeeping practices, it is impossible to make an accurate assessment of the danger. The best source of nationwide statistics is the Federal Bureau of Investigation's Uniform Crime Reports, which are compiled quarterly and annually from information submitted by local law enforcement agencies. The statistics on assaults on police officers are grouped according to the type of activity in which the officer was engaged when assaulted, but the general category "responding to a disturbance call" is not subdivided into types of disturbances. This category combines interspousal assaults with other domestic disturbances, barroom fights, and street disturbances.

The Uniform Crime Reports show that 32 percent of the reported assaults on officers during 1977 occurred in connection with a "disturbance call," as did 16 percent of all officer deaths during the 10-year period from 1968 to 1977.[9] These statistics are frequently cited in discussions of spouse assaults without making it clear that only a fraction of the "disturbance calls" involved wife abuse.[10] The result is that the danger of intervening in domestic disputes, while significant, is exaggerated. Although some studies are beginning to recognize that the danger to police officers has been exaggerated,[11] the fact remains that many police officers perceive the peril to be great. This perception cannot be effectively challenged until reporting procedures are refined to permit an accurate compilation of information on spouse assault cases.

Further complicating the police officer's task in domestic violence cases are the emotional, marital, and financial relationships between victim and assailant, factors that are absent in most other assault cases. These factors lead to complications police officers normally do not encounter and for which their training on arrest and interrogation procedures may not have prepared them.

Police officers testifying before the Commission reported that victims of domestic assault are very often highly upset and unsure of what they want the responding officers to do. In many other crimes, the officer can expect willing cooperation and support from the victim. The battered woman's initial confusion and fear may put the officer in the unfamiliar and uncomfortable position of having to make an enforcement decision contrary to the expressed wishes of the victim. As one former chief of police testified,

> Blood is thicker than water is a true thing out here, and it's hard to get the woman to come forward and sign complaints and follow through on it because in many instances it is her source of revenue to keep the family together. And in many instances she loves him. She still does love him.[12]

The recurring nature of domestic violence also complicates matters for the police. Many women summon police assistance numerous times during a violent relationship. Data from a questionnaire administered to shelter residents in Phoenix showed that of 78 women responding, 55.2 percent had called the police between 1 and 4 times before to coming to the shelter, 10.3 percent had called 5 to 10 times, and 6.4 percent had called more than 10 times.[13] The fact that officers often confront the same problem repeatedly with the same couple was mentioned by several police officers as a major source of frustration:

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[5] Richard Twitchell, testimony, *Phoenix Hearing*, p. 51.

[6] Ibid., p. 38.

[7] Calvin Baker, testimony, *Hearing Before the U.S. Commission on Civil Rights, Harrisburg, Pennsylvania*, June 17–18, 1980 (hereafter cited as *Harrisburg Hearing*), pp. 85–86; Stanley Krammes, testimony, *Harrisburg Hearing*, p. 137; Twitchell Testimony, *Phoenix Hearing*, p. 38.

[8] International Association of Chiefs of Police (IACP), Training Key No. 246 (1976); Police Academy training materials supplied by Capt. Glenn Sparks, Phoenix Police Department (Modesto Jr. College West training brochures nos. VII–C–3 through 5, in Commission files).

[9] U.S., Department of Justice, Federal Bureau of Investigation, *Crime in the United States—1977*, pp. 288–90.

[10] Del Martin, statement, *Battered Women: Issues of Public Policy*, a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., Jan. 30–31, 1978, p. 8 (hereafter cited as *Consultation*), p. 8; Marjory Fields, statement, *Consultation*, p. 23.

[11] Mona Margarita, "Killing the Police: Myths and Motives," *Annals of the American Academy of Political and Social Science* (November 1980), pp. 64, 69.

[12] Lawrence Wetzel, testimony, *Phoenix Hearing*, pp. 60–61.

> Perhaps [the officer] has been there three or four times before. . . .Sometimes these are just weekly situations and, as was indicated by the previous officers, alcohol is a big factor. Daddy gets drunk on Friday and stays that way all weekend, so you have a fight all weekend. So the officers almost know what is going to happen. They also know that the woman in these kinds of situations probably isn't going to prosecute. All she wants is somebody to straighten this person out.[14]

Police officers become frustrated when it appears that their intervention has made no difference. In the words of one police officer, "[A]lmost to a man and a woman the people that join the police department join to serve. They join to really honestly help other people. And the domestic situation is one of the [situations] where there is not a whole lot they can do."[15]

These police attitudes influence the behavior and decisions of officers as they confront cases of domestic violence, but formal departmental policies also play a large role. Battered women and their advocates have complained that police officers sometimes fail to respond at all to calls for help.[16] Testimony received by the Commission indicates that nonresponse is indeed the policy in some police departments. One officer serving primarily rural areas of Pennsylvania testified that officers at his station responded in person to only one out of every five or six domestic disturbance calls:

> **Sergeant Krammes.** If there's a threat of abuse or if there's abuse going on at the time, we always respond, but we use the guideline that, if the problem is already resolved, we give them the various agencies that can assist them or the district justice's telephone number. If they don't have transportation there, we will transport them.
>
> **Counsel.** What standards do you use to determine whether or not to respond to a domestic call?
>
> **Sergeant Krammes.** The situation itself. If there is a situation right at the time. In other words, if a woman has already been abused and her husband is no longer there, if there is no need for us there, then we inform her of the legal procedures. She can get the Protection from Abuse [order], or she can go to the district justice and charge her husband with assault.[17]

Research conducted in Kentucky in 1979 revealed that police failed to respond to 17 percent of all calls for help from battered women.[18] Such police practices put the burden of law enforcement squarely upon the assault victim, relieving the police of any obligation to investigate, to collect evidence, or even to record the crime.

Even where police do respond to domestic violence calls, they often refrain from making arrests, due to formal or tacit departmental policy. A recent publication of the Police Executive Research Forum states:

> No other aspect of handling spouse abuse and wife beating cases is more controversial than police use of arrest against the assailant. Many police officials do not believe that arresting assailants will have any positive results and that this practice places a drain on limited police resources.[19]

The police have been widely criticized for their failure to take appropriate action against assailants.[20] This practice has been attacked because it denies the victim of domestic violence the protection usually afforded the victim of violent crime, it puts the burden of pursuing any legal action squarely upon the victim, and it perpetuates the abuse cycle by indicating to the assailant that his actions are not viewed as serious by the legal system.

Police officers testifying before the Commission indicated that arrests in domestic abuse cases are rare, confirming the testimony of battered women's advocates in both Phoenix and Harrisburg and evidence from other sources. For example, a Harrisburg police official stated that "once [the officers] arrive, they are instructed to calm the situation, to keep control, to protect the participants, and to try to keep it out of the legal field and to recommend outside agencies to handle the problem."[21] A Phoenix officer in charge of training stated, "[O]bviously if we can avoid putting somebody in jail and still solve the situation that is exactly what we want to do in most cases."[22]

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[13] Between Jan. 17 and June 31, 1980, Phoenix shelter intake personnel administered an OMB-approved questionnaire devised by Commission staff, who later tabulated and analyzed the results. Although a sample of 83 respondents was obtained, the sample for "prior police involvement" was only 78, because 4 respondents did not answer the question and 1 response was inapplicable.

[14] Lawrence Wetzel, testimony, *Phoenix Hearing*, p. 60.

[15] Twitchell Testimony, *Phoenix Hearing*, p. 40.

[16] Martin Statement, *Consultation*, p. 210.

[17] Krammes Testimony, *Harrisburg Hearing*, p. 131.

[18] State of Kentucky, Commission on Women, *Survey of Spousal Violence Against Women in Kentucky* (Louis Harris and Assoc., 1979), p. 40.

[19] Loving, *Responding to Spouse Abuse*, p. 60.

[20] See, for example, *Consultation*, pp. 6–9, 21–22.

Law enforcement officials offer a variety of explanations for decisions not to arrest in cases of domestic assault. Probably the most frequently cited reason is that the victim does not wish to have him arrested. Police officers are accustomed to having the cooperation of the victim of a violent crime, and most want to protect the victim's interests. They are reluctant, therefore, to overrule the victim's desires and arrest her assailant. A Phoenix police lieutenant described a scenario:

> The first officer would arrive on the scene and he'd gain entry into the house. . . .
>
> You now observe her. She has got a large laceration above the eye, maybe a fracture to the bone just under the eye, and he is standing there, in the routine case, inebriated, belligerent, and aggressive.
>
> The first thing you do, is you render him unable to injure anybody else. . . .Then you go to the victim and you render the immediate and temporary first aid. You check her over. If you need the fire department paramedics you call the fire department paramedics.
>
> You have now separated these two. You have talked to her and she advises you that he came home, he was inebriated, he had had a bad day at work, and she cooked liver and he hates liver. So for no reason he picked up a brick, and it's just about that much reason for it, he picks up a brick and smashes her in the face.
>
> We then say, "What do you want to do about it?". . . .
>
> [I]f she is a reluctant victim, we will not arrest him. We will make a report on it, but we will not arrest him if she is not desirous of prosecution.[23]

Other witnesses indicated that officers do not always make arrests, even when the victim specifically requests it, since many officers expect that the victim will later change her mind. The acting police chief in Phoenix said:

> ACTING CHIEF KORNEGAY. Considerable weight should be given to the indicated desire of the injured party to have the person arrested. However, from a realistic standpoint, the officers have to realize that minds are changed in these types of situations after the heat of battle, if you will. . . .
>
> COUNSEL. So you are saying that while the woman may express a desire for arrest on the spot, it's, in your experience, likely that later on she will change her mind?
>
> ACTING CHIEF KORNEGAY. I think that is my experience and I think that has been the experience of many police officers that have been involved in the family dispute problems for many years.
>
> COUNSEL. And you think it's appropriate for the officer to take that into account in deciding whether or not to arrest?
>
> ACTING CHIEF KORNEGAY. I think it is appropriate to consider that as one of the many factors and many complexities of the role that we play.[24]

Statistics drawn from a sampling of Phoenix police reports appear to confirm Chief Kornegay's impression that victims of domestic violence often fail to press charges against their abusers. More than half of the domestic assault cases reported were "exceptionally cleared," a term defined by the Phoenix Police Department to mean terminated at the victim's request or for lack of victim cooperation. These reports do not indicate, however, whether any attempt was made to encourage the victim-witness' continuing cooperation, or whether the police officers' expectations that the case would be dropped actually discouraged victims from pursuing prosecution. In one police report, for example, the following description of a discussion with the assault victim was given:

> [Detective] advised [victim] of the various courses of action available to her in settling the reported assault. Victim agreed that she didn't want to spend a lot of time in court. Victim said she wanted the suspect warned about the physical attack on her. Victim also wanted the suspect to stay away from her. On this same date [an officer] advised suspect of the reported assault listing him as a suspect. Suspect was told to stay away from the victim. Suspect agreed and said victim had called him and said she loved him still. Exceptionally cleared.[25]

Victim advocates have testified that the systematic resistance of police, prosecutors, and judges to cases of domestic assault, together with pressures from the abusive mate, contribute to women's decisions to drop charges.[26] Training materials prepared by the International Association of Chiefs of Police (IACP) make a similar point:

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[21] Richard Gibney, testimony, *Harrisburg Hearing*, p. 37.

[22] Glenn Sparks, testimony, *Phoenix Hearing*, p. 44.

[23] Twitchell Testimony, *Phoenix Hearing*, pp. 52–53.

[24] Robert Kornegay, testimony, *Phoenix Hearing*, p. 65.

[25] Phoenix Police Department, Departmental Report 79-038636, in Commission files.

> Frustrated by the pattern of victim uncooperativeness, some police officers have developed an indifferent attitude toward arresting assaultive husbands. Battered wives in turn point to this attitude as one reason why they fail to proceed legally against their spouses. The two conflicting views produce a "chicken-versus-the-egg" controversy that is useless to pursue.[27]

Regardless of the reasons for victim noncooperation, experts advise that arrest of the assailant may be in the victim's best interest, even though she may not demand it. A growing number of organizations now support abandonment of nonarrest policies. In its wife abuse training materials, the IACP has taken a firm stand in favor of arrest in cases of domestic assault:

> A critical difference exists between the police response to family disturbances where no physical violence has occurred and a wife beating. Although the application of crisis intervention skills are required in both cases, the primary purpose of mediation to help resolve family problems is to prevent violence and therefore make arrest unnecessary. . . .A wife beating is foremost an assault—a crime that must be investigated. . . .
>
> An assault cannot be ignored by the police regardless of the victim's attitude or motive for not cooperating. Each wife beating incident must be investigated, and the officer's decision to make an arrest or a referral to an appropriate social service agency should be based on the nature of the assault. . . .
>
> A policy of arrest, when the elements of the offense are present, promotes the well-being of the victim. Many battered wives who tolerate the situation undoubtedly do so because they feel they are alone in coping with the problem. The officer who starts legal action may give the wife the courage she needs to realistically face and correct the situation.[28]

Some police officers also fail to recognize that when they respond to domestic assault calls their responsibility extends beyond the individual victims of assault. The officer's duty is to stabilize the situation and assess the available evidence to determine whether there is reason to believe that a crime has been committed by the suspect. If so, then such action is to be taken as would be appropriate in any other case of assault. This is not to suggest that the police officers' role is a strictly mechanical one, nor that they should ignore the human needs of the victim. Such functions as mediating potential conflicts, referring those in need to appropriate services, and lending emotional support are, however, accessory to the officer's primary job of upholding the law and bringing violators into the criminal justice system.

In most American jurisdictions, police officers may make an arrest without a warrant only where they have probable cause to believe a felony has been committed or where a misdemeanor has occurred *in their presence.*[29] Officers appearing before the Commission testified that this restriction prevents them from making arrests in most cases of domestic assault.[30]

An initial inquiry must be whether police officers are accurately distinguishing between misdemeanor (simple) and felony (aggravated) assaults. As discussed in chapter 2, the statutory definitions and classifications of assaults vary from State to State, but in most instances the statutes give little objective guidance to the police officer on the scene. Arizona, for example, requires that the victim sustain "serious physical injury" for a felony assault to be charged. Such injury is described in the statutory comment as:

> physical injury which creates a reasonable risk of death, or which causes serious and permanent disfigurement, or serious impairment of health or loss or protracted impairment of the bodily function of any bodily organ or limb.[31]

Such a definition is difficult for a police officer to apply at the scene, where the actual extent of the victim's injury is often not known. A blackened eye may appear to be a minor injury, but a detached retina or facial fracture may have been caused by the blow.

Without guidance or support from the police department and other components of the criminal justice system, some officers simply classify the vast majority of domestic assaults as misdemeanors rather than taking care to determine whether the elements of a felony are present. This presumption leads officers to fail to arrest even in cases in which they clearly have authority to do so. For example, police may overlook use of a weapon. In most jurisdictions, assault with a dangerous or deadly weapon is categorized as a felony assault regardless of the extent of injury actually inflicted. Police reports reviewed by Commission staff included many descriptions of domestic assaults with guns, knives, pieces of furniture, clubs, and other dangerous instruments. Such assaults are felonies and call for arrest whether or not the officer witnessed the attack.

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[26] Patricia Magrath, testimony, *Phoenix Hearing*, p. 14.

[27] IACP, Training Key No. 246 (1976).

[28] IACP, Training Key No. 245.

[29] Loving, *Responding to Spouse Abuse*, pp. 61–65.

[30] Peter Brooks, testimony, *Harrisburg Hearing*, p. 39; John Riegle, testimony, *Harrisburg Hearing*, p. 200.

[31] Ariz. Rev. Stat. §13-105 (29) (1978).

Even when the elements of a felony are lacking, grounds for arrest frequently exist. In some cases the abuser commits a misdemeanor in the officer's presence by continuing to beat, push, or threaten the victim. Research by Commission staff indicates that even continued aggression toward the victim sometimes fails to result in arrest.

In some jurisdictions statutes provide for the issuance of citations to perpetrators of minor criminal offenses. The citation, which is merely a summons to appear before a judicial officer, much like a traffic ticket, is often improperly substituted for arrest in domestic violence cases. For example, an assailant in a Harrisburg incident was given a citation, although the police report stated that "above person did punch [victim] in the face and threaten her in front of this officer."[32] In another Harrisburg incident, a police officer called to a scene of domestic violence issued a citation to the man involved for the summary offense of "harassment" when he pulled off the victim's clothes, hit her in the chest, face, and stomach, and held a gun to her head.[33]

Police officers in Phoenix testified that departmental policy required them to use the citation and release procedure even when they had grounds for a misdemeanor arrest. The acting chief of the Phoenix Police Department testified:

> [U]nder certain conditions, our authority to arrest is followed up with a statutory requirement to cite the person into city court. . .and release that person right there. I believe that every officer should consider the potential for further inflaming the situation by making an arrest of one party in a dispute and not removing that party from the location or from the scene of this problem, merely issuing them a citation, handing it to him and making them promise to appear in court at some future date and then leaving.
>
> I would feel that, myself, and many officers would feel that this would not tend to stabilize that particular situation.[34]

In fact, the departmental order requiring citation and release of misdemeanants makes an exception for cases in which "there is immediate danger to the public, or it is likely that the violation will continue, or that other violations will occur. . . ."[35] This exception to the citation rule does not, however, appear to be well known.

When the officer does not witness the assault and careful investigation reveals no support for a felony arrest, police officers are usually powerless to arrest without a warrant.[36] In such cases, however, the victim herself may be empowered to make the arrest under a State citizen's arrest law. The Phoenix Police Department's written guidelines on family disputes specifically mention the use of citizen's arrest in appropriate cases:

> If one spouse commits a misdemeanor assault on the other an arrest by an officer (if the offense occurs in his presence) or a Citizen's Arrest by the victim may be made in accordance with prescribed procedures for Citizen's Arrest.[37]

In a citizen's arrest, the victim plays the role usually played by a police officer, since the victim has witnessed the commission of a misdemeanor.

A citizen's arrest statute cannot become a useful law enforcement tool in domestic assault cases, however, unless police officers inform victims of its existence and help them to meet its legal requirements. For example, the Phoenix Police Department's guidelines state that "the prisoner is in custody of the citizen (either by actual physical restraint or the prisoner's voluntary submission to the arrest)."[38] Although a battered woman will rarely be capable of physically restraining her attacker alone, one Phoenix officer said that in practice the officers merely require that the victim declare that she is arresting the assailant and take his arm momentarily. The custody of the prisoner is then immediately assumed by the officers.[39] This procedure is not spelled out in the guidelines, however, and thus may not be uniformly applied by all officers.

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[32] Harrisburg Police Department, Initial Crime Report 79-5-4401, in Commission files.

[33] Harrisburg Police Department, Initial Crime Report 79-9-5038, in Commission files.

[34] Kornegay Testimony, *Phoenix Hearing*, pp. 65–66.

[35] Phoenix Police Department, Operations Order D-3(8).

[36] But see discussion of new State legislation in this area, in chapter 2.

[37] Operations Order C-3, ¶3D.

[38] Operations Order B-1, ¶6A, implementing Ariz. Rev. Stat. §§13-3889, and 13-9000 (1978).

Several police officers who testified before the Commission expressed the opinion that arrests in cases of domestic assault may lead to civil liability on the part of the police officer. One officer stated:

> It would be very simple for an officer to walk in and see a red spot on a wife's eye and say, "I have got probable cause to make an arrest," and jerk the husband out of the house, when in fact it may have been self-inflicted and you are not told the right story. Then we are back into lawsuits.[40]

To protect officers from possible civil liability in these cases, several States have enacted statutes granting police officers limited immunity. These laws protect officers against civil suits for any action taken in a good-faith effort to enforce the provisions of a domestic violence statute. Ten States (including Arizona) have enacted police immunity laws as part of a legislative package addressing domestic violence.[41]

Since police officers tend to avoid arrests in cases of domestic violence, they often seek alternative ways of dealing with such cases. Testimony at the Commission's hearings indicated that officers often welcome and become adept at using new methods and resources once they are convinced of their utility. All the alternatives discussed in this report—crisis intervention, recommendations of civil legal remedies, referral to social services, and separation of the victim and assailant—are appropriate in some domestic disputes. They are not, however, adequate substitutes for arrest in those cases in which violence has already erupted, nor do they absolve officers of their duty to investigate and record spousal assaults.

The last two decades have seen an increasing tendency for law enforcement agencies to seek and apply the expertise of behavioral and social scientists to police work. This alliance has revolutionized the ways the criminal justice system deals with the mentally ill, the homeless, and juvenile offenders. A part of this revolution has been the adoption of crisis intervention techniques for dealing with disputes between neighbors, landlords and tenants, and family members. Generally, these procedures call for the responding officer to calm the dispute, listen carefully to both parties without showing favoritism or fixing blame, and suggest ways to resolve the problem without involvement of the criminal justice system. Although useful in many contexts, some experts believe that this approach has no place in the handling of domestic violence. As the author of one study sponsored by the Police Executive Research Forum observed:

> The police practices now in use developed more than a decade ago as a result of the misapplication of intervention techniques designed specifically for arguments and crisis situations in which only a verbal dispute was at issue. At no time were these techniques intended to replace the use of arrest in situations involving serious injury or criminal assaults. Rather, arbitration, mediation, and negotiation were to be used in situations in which, because of lack of evidence or insufficient probable cause, an arrest was neither legal nor appropriate.[42]

This author traces the misapplication of mediation techniques in domestic violence cases to a 1967 experimental program in New York City. The program involved formation of a specialized family crisis unit within the New York City Police Department. The officers assigned to the team were intensively trained in crisis intervention, interpersonal conflict management techniques, and the use of referrals to social service agencies. At the end of the 2-year experiment, the program was found to be successful in reducing both the incidence of domestic disturbance calls and the number of officer injuries. Police departments nationwide thereafter incorporated crisis intervention procedures into training programs on handling domestic disputes.[43]

Crisis intervention techniques were intended by the designers of the New York project to be applied only in cases involving verbal disputes:

> The psychologists assumed that situations involving violence and assault exceeded the limits of "crisis intervention" and that the police powers of force and arrest would be invoked. Unfortunately, this was not to happen. Because there was no further analysis of the problem, training, and direction, police officers have been taught to handle all family conflict calls with these reconciliation techniques. If more precise guidelines had been developed as to when and in what circumstances to use these

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[39] Richard Twitchell, Lieutenant, Phoenix Police Department, interview, Dec. 5, 1979.

[40] Sparks Testimony, *Phoenix Hearing*, p. 56.

[41] *Response*, June 1980, pp. 1–2.

[42] Loving, *Responding to Spouse Abuse*, p. 33.

[43] Ibid., p. 34.

techniques, police handling of spousal violence calls might well have been more effective.[44]

Police officers' use of mediation techniques in domestic assault cases has given rise to vociferous criticism from battered women and their advocates. The neutral terminology and nonauthoritarian approach, so important to successful intervention and conciliation in some cases, leads battered women and their assailants to conclude that the police do not view wife battering as a crime and will not take enforcement action against assailants. Misplaced attempts to retain a detached and neutral attitude in these cases have led some police to avoid taking appropriate enforcement action even when blatant, repeated violence is concerned. One crisis counselor testified:

> In one case I had just recently, a woman was assaulted about 12 times in front of the police. She had bruises up and down her arms. And the only remedy she was given was they kept saying, "Don't do it again, Jimmy, don't do it again."[45]

In some cases, the crisis intervention approach seems to eclipse entirely the criminality of domestic assaults, so that the police force's arsenal of enforcement, investigation, and recording procedures appears to the officer to be irrelevant.[46]

Police officers have long adopted the policy of separating the assailant and victim by transporting one party to the home of a friend or relative. The Phoenix Police Department's written guidelines on family disputes advise that "the best solution. . .is generally for one of the spouses to leave the home until the next day."[47]

Separation reduces the possibility that the abuser will assault the victim again as soon as the police officers depart and allows for a "cooling off" period. It is the preferred solution in cases in which officers have no grounds for arrest, but suspect that violence may break out if the parties are left alone together.[48] Voluntary separation cannot, however, be considered an adequate substitute for investigation and documentation of the disturbance. The fact that a violent incident occurred and was neither looked into nor recorded has serious ramifications for the victim, particularly if she ever intends to pursue a case through the criminal process. As will be discussed in subsequent chapters, prosecutors seldom bring a case to court if they believe it to be a first incident, judges divert defendants if there appears to be no history of abuse, and shelters rely on official records to prepare and compile the data necessary to secure funding for their operations.

An initial consideration is which party should leave the household. In many cases, police officers reportedly assume that the victim should be the one to seek other living arrangements, even when she must take responsibility for minor children.[49] If the victim takes her children with her, it may be even more difficult to find accommodations; if she does not, she may be denied custody in a subsequent divorce action on grounds that she "abandoned" the children. On the other hand, allowing the victim to remain in the home also presents problems; in most cases, the officer cannot force the suspect to leave unless the grounds for arrest exist. In addition, if the abuser knows where the victim is staying, he may return to threaten her at any time.

Another consideration is the availability of suitable living arrangements. The battered woman may have no relatives or close friends nearby, a problem exacerbated by the increasing mobility of American families. Even if friends or relatives are present, they may be unable to accommodate the victim and her children, or the victim may not be willing to involve them in her problem. The availability of shelters for battered women can help to resolve the problem of temporary housing, but not the long-term problem.

Police officers testifying before the Commission welcomed the development of shelters in their communities because it furnished them with another option to exercise in cases of domestic violence. A former police chief testified:

> [T]o me the quickest thing that can happen, and this is a short term thing, is the immediate ability to get that woman out of that household, if she will go, into an environment where she can receive counseling and help and the kids can receive a normal environment and not have the screaming and yelling and threatening around them. . . .[50]

The shelter operators who testified before the Commission stated that after an initial period of "testing," the police officers with whom they had contact were exceptionally responsive to their needs:

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[44] Ibid., p. 36.

[45] Magrath Testimony, *Phoenix Hearing*, p. 10.

[46] Krammes Testimony, *Harrisburg Hearing*, p. 131.

[47] Operations Order C-3, ¶3B(l).

[48] Loving, *Responding to Spouse Abuse*, p. 106.

[49] Joanne Rhoads, testimony, *Phoenix Hearing*, p. 9.

[50] Wetzel Testimony, *Phoenix Hearing*, p. 61.

> I would like to say. . .that when the police do answer our calls at Rainbow Retreat, and we depend very, very heavily on them for security since we [have] an open, published address, that we find they're extremely sensitive to the problem. They are very helpful and they are protective, not just to the center itself but also to the women. It's as if once the woman has made a commitment to do something, they are more willing to work with her.[51]

Contact with the shelters also presents an opportunity for officers to become more sensitive to the needs of women abuse victims and to understand some of the reasons why battered women remain in violent relationships.

Battered women and their advocates have long charged that, rather than taking enforcement action, police officers routinely refer victims of domestic assault to the civil courts.[52] These practices may stem from an officer's belief that a domestic assault is not a matter for the criminal justice system, or from an officer's attempt to steer the victim toward a remedy that the officer believes to be more effective in the long run. In either case, the officer's substitution of referrals to civil remedies for appropriate criminal enforcement and reporting procedures affects the police effort as well as the victim's welfare.

In most States the civil remedies available to a battered woman are neither easy to obtain nor effective in curbing further violence. The victim must appear before a judge or magistrate, neither of whom is usually available during the evening and weekend hours when most abuse takes place.[53] In many cases the victim must hire an attorney to represent her and must pay the court costs and service fees incurred.

Civil orders do not substantially reduce the need for police involvement. When an abusive spouse violates an order, the police must still be summoned to provide protection and to take action against the violator. Many police officers, however, decline to become involved in the enforcement of civil orders, even when their violation constitutes a crime.[54]

Police emphasis upon civil remedies sometimes results in further deemphasis of the criminal nature of spouse abuse. One women's advocate testified that Pennsylvania's statutory provision for improved civil remedies appeared to discourage police officers from making arrests in some cases:

> What we're seeing in Dauphin County now is that. . .the criminal justice system is deflecting cases away from the criminal justice system and putting them into the civil system and trying to avoid the criminal cases because the Protection From Abuse Act is available.
>
> We are finding situations where the police will not make an arrest when they witness a crime or, when a crime has been alleged, they will not take a charge because nobody has a protective order. . . .[55]

Debate over the need for law enforcement reform in the handling of domestic violence cases is hindered by the inadequacy of current police reporting practices. A recurring theme throughout the Commission's hearings was the current inability of police agencies to know the number of domestic assault cases to which officers respond, the seriousness of the assaults, and the police action taken.

Police officers are usually required to make some record of each significant task performed on duty. For minor tasks, the record may consist of a brief notation on a log or worksheet. Reports of crimes, however, are generally lengthy, detailed, and time consuming for the officer.

In many cases, the Commission found, police officers routinely fail to record cases of alleged spouse assault as they would other crimes of violence. The Phoenix Police Department, for example, requires that a lengthy, detailed departmental report (or "D.R.") be used "to report any crime, any incident in which there will or may be further follow-up, or whenever there is the possibility of a delayed request for prosecution."[56] The written guidelines leave little doubt as to the importance of completing a D.R. whenever an assault is alleged:

> B. Officers will prepare a D.R. whenever circumstances indicate the necessity; when in doubt, officers will complete a D.R.
>
> (1) The victim's motive for reporting an incident will not be used as a test for deciding whether a crime has occurred or whether it should be reported, i.e., the victim

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[51] Rhoads Testimony, *Phoenix Hearing*, p. 9.

[52] See, for example, Fields Statement, *Consultation*, p. 22; Golden Johnson, statement, *Consultation*, pp. 59–60.

[53] See discussion of civil protective orders, chapter 2.

[54] The Phoenix Police Department's written guidelines forbid officers from taking enforcement action on violations of restraining orders. Persons desiring to have orders enforced are to be advised to contact the judge who signed the order for a summons. Operations Order C-3, ¶7.

[55] Nancy Rourke, testimony, *Harrisburg Hearing*, p. 157.

[56] Operations Order E-2, ¶1.

> is not interested in prosecution or is making the report for insurance purposes only.
>
> (2) D.R.s will be made on offenses, felony or misdemeanor, involving either adults or juveniles as suspects or victims; if the elements of a crime are present but the suspect is unknown or there is no need for a follow-up investigation, a D.R. will still be completed. . . .
>
> C. If an officer is in doubt as to whether a crime has occurred or the incident occurred outside the jurisdiction of the City of Phoenix, a D.R. will be made and entitled "Information Received."[87]

In spite of this clear instruction, Phoenix police officers apparently fail to file D.R.s in many cases of spouse abuse:

> COUNSEL. In your opinion, is an officer always required to file a D.R. when there is probable cause to believe that an assault has been committed?
>
> ASST. CHIEF LOZIER. Not really. There is not a written established policy that says that you will and there is not one that you won't. Some discretion is left to the officer to determine [if there was] an assault. . . .
>
> And in some situations, where either the witnesses or the victim is not cooperative, probably, he may have a good idea that an assault occurred but not feel he has enough to verify that assault did occur. So, consequently, he will not make a report other than maybe what we call a "combination report," which is just a smaller report of the incident.[88]

The acting chief of the police department agreed:

> COUNSEL. [I]s it your understanding that officers should always prepare a departmental report when the victim alleges that she was assaulted?
>
> ACTING CHIEF KORNEGAY. No, it is not my understanding. . . .
>
> There is such a wide variety of potential situations that our officers can get involved in, it's very difficult to draw hard lines for them to follow. And we do have to allow their discretion. And I think it's safe for them to use their discretion to [a] point. . . .[89]

As a result of this informal policy, Phoenix officers often note domestic disputes only on their daily work logs or on a brief, index-card-size "combination report." Neither of these records is cross-indexed by type of crime, and incidents reported on them are not included in the department's crime statistics submitted to the Federal Bureau of Investigation. Clearly, this leads to a significant underestimation of the number of domestic abuse cases handled by the police.

Even when full reports are completed, it is difficult to develop reliable statistics. In most States "domestic assaults" do not constitute a separate criminal violation. They may be reported as assaults, harassment, criminal trespass, breaking and entering, or homicide. Often it is impossible to discern the relationship between assailant and victim from the report itself. The failure to designate domestic assaults as such handicaps a department's efforts to calcuate the amount of time its officers spend on duties related to woman battering and also makes it difficult to test the validity of certain widely held perceptions about these cases, such as the actual rate of victim noncooperation.

Findings

Finding 3.1: Police decisions, including departmental policies and the practices of individual officers, affect the justice system's ability to protect the legal rights and physical safety of battered women.

Finding 3.2: Police traditionally have viewed most incidents of spouse abuse as private matters that are best resolved by the parties themselves without resort to the legal process.

Finding 3.3: Police generally are reluctant to respond to domestic disturbances, which the officers view as dangerous to themselves, emotionally charged, and difficult to resolve. Some police departments do not require officers to respond to such calls, while other departments assign the calls low priority.

Finding 3.4: Many police departments apply formal or tacit arrest-avoidance policies to domestic violence cases.

Finding 3.5: Police officers are trained and encouraged to apply mediation and conciliation techniques in cases involving criminal spousal assault, where such techniques are inappropriate.

Finding 3.6: Instead of taking appropriate police action, officers frequently recommend that domestic assault victims seek civil legal remedies or file private criminal complaints.

Finding 3.7: Police officers frequently try to separate the assailant and victim for a short time, rather than make an arrest. In such cases, shelter facilities for battered women and their children provide a vital service.

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[87] Operations Order E-2, ¶2B, 2C.

[88] Donald Lozier, testimony, *Phoenix Hearing*, p. 47. The "combination report" referred to is printed on an index card and is not designed to be used for recording crime information. Operations order E2, par. C.

[89] Kornegay Testimony, *Phoenix Hearing*, p. 67.

Finding 3.8: Existing reporting practices handicap police ability to deal effectively with domestic assault cases and unnecessarily limit the amount of available information about spouse abuse.

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Chapter 4

The Prosecutors

Prosecutorial policies have important effects upon other components of the justice system. The prosecutor exerts considerable influence over the police, sending officers formal and informal messages on the content of criminal statutes, the priority assigned to various law enforcement problems, and in some jurisdictions, charging policies or guidelines.[1] Prosecuting attorneys can sometimes influence the actions of a court by carefully selecting and preparing the cases brought to trial. Alternatively, they learn which cases a judge views as serious and which are treated summarily, and they may resolve conflicts created by a heavy caseload by devoting more time to cases likely to result in conviction.

The prosecutor is not required to bring criminal charges against the suspect in every case. A complaint of assault or other crime, whether submitted by the police or the victim, is evaluated by a prosecuting attorney. He or she may decline to prosecute cases, and the exercise of discretion in this decision is not subject to judicial review except in cases of flagrant abuse.[2]

A nationally recognized expert in administrative law and due process, Kenneth Culp Davis, has noted the almost total absence of guiding principles in this area:

> Viewed in broad perspective, the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all others is the power to prosecute or not prosecute. The affirmative power to prosecute is enormous, but the negative power to withhold prosecution may be even greater, because it is less protected from abuse.[3]

According to experts in administration of justice, it is "beyond doubt" that the principal objective of the prosecutor is to obtain convictions.[4] Prosecutors tend to measure their effectiveness by the number of convictions they obtain, weighted according to the severity of sentence pronounced.[5] As one Arizona prosecutor explained:

> [W]e find ourselves in a situation where the problems of crime, particularly in this State, are rapidly exceeding the constraints imposed upon us by budgets. We have to resort to a system of prioritization; the pure and simple fact is, that when called upon to establish priorities, whether you're a police officer or. . .a prosecutor, you're going to establish those priorities in the areas where you feel you can do the most good.[6]

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[1] In Harrisburg, for example, the district attorney distributes bulletins on various law enforcement problems and statutory changes to the police agencies. Richard Lewis, testimony, *Hearing Before the U.S. Commission on Civil Rights, Harrisburg, Pennsylvania,* June 17-18, 1980 (hereafter cited as *Harrisburg Hearing*), pp. 54-55.

[2] Sue Eisenberg and Patricia Micklow, "The Assaulted Wife: 'Catch 22' Revisited," *Women's Rights Law Reporter,* vol. 3 (1977), p. 158.

[3] Kenneth Culp Davis, *Discriminatory Justice* (Urbana: University of Illinois Press, 1971), p. 188.

[4] B. Forst, J. Lucianovic, and S. Cox, *What Happens After Arrest? A Court Perspective of Police Operations in the District of Columbia,* publication no. 12, PROMIS Research Project (Washington, D.C.: Institute for Law and Social Research, 1978), p. 65.

[5] Ibid.

[6] Stephen Neeley, testimony, *Hearing Before the U.S. Commission on Civil Rights, Phoenix, Arizona,* Feb. 12-13, 1980 (hereafter cited as *Phoenix Hearing*), p. 219.

This institutional process leads prosecutors to prefer to expend their efforts on cases in which chances of a conviction and serious penalty are good, and to seek to divert or dismiss cases considered poor risks. Such tendencies may be desirable when they result in the screening out of cases likely to fail due to evidentiary weaknesses. A more serious problem may arise, however, if the odds against successful prosecution are lengthened by prior prosecutorial practices.

Victims of domestic violence and their advocates have repeatedly stressed the difficulty of obtaining criminal sanctions against their abusers. The results of several studies indicate that the presence of a prior victim-assailant relationship significantly reduces the likelihood of charges being brought and increases the rate of dismissal and reduction of the charge to a misdemeanor.

One police expert testified at the Commission's 1978 consultation that the salient factor in predicting the criminal justice system's response to a domestic assault case was the social, and not the legal, relationship between the assailant and his victim:

> The only criteria that law enforcement agencies use is prior sexual access. Once that definition has been determined to exist then from that moment forward the criminal justice system treats her as a second-class victim. She doesn't even have the rights, limited rights that a female victim would have ordinarily in any other assault case.[7]

A research project conducted by the Institute for Law and Social Research (INSLAW) in 1978[8] found that cases of violent crime were less likely to result in a conviction when a close relationship was involved. If a victim and a defendant were married, the study showed, prosecutors were more likely to decline prosecution in aggravated assault cases and to dismiss assaults filed as misdemeanors. Further, the study found that romantic involvement between the victim and defendant, whether past or present, influenced the outcome of the case. Simple assaults involving ex-spouses, cohabiting persons, or girlfriends and boyfriends were more likely to be dropped at screening, and felony assaults prosecuted as misdemeanors were more likely to be dismissed later.[9]

A 1974 study by the same research organization also revealed a marked discrepancy between stranger and nonstranger cases. The research showed a 32 percent conviction rate for stranger-to-stranger assaults and aggravated assaults; for intrafamily cases, the conviction rates were 8 percent and 18 percent, respectively.[10] A 1977 study by the Vera Institute of Justice found that arrests for assault resulted in eventual dismissals in 29 percent of the stranger-to-stranger cases, and in 52 percent of the cases in which there was a prior relationship between suspect and victim.[11]

Research conducted by Commission staff in Phoenix disclosed that felony charges were filed in only 6 out of 23 woman abuse cases referred to the Maricopa County Attorney's Office by the Phoenix Police Department. Prosecution was declined in the remaining 17 cases for the reasons indicated in table 4.1.

The findings in the above-cited studies do not show why crimes committed against spouses or mates are less likely to result in conviction or at exactly what point in the process the cases falter. These studies do confirm, however, that the path a case may be expected to take through the criminal justice system depends to a large extent upon the existence of a relationship between the suspect and the victim.

Battered women's advocates have criticized law enforcement policies that draw distinctions between beatings sustained at the hands of a husband and those committed by a stranger. One commentator has concluded that "prosecutors tend to view woman abuse complaints as extralegal family matters which the overburdened judicial system not only cannot, but should not, handle. . . ."[12]

Leslie Nixon, a legal aid attorney and member of the Law Project for Battered Women in Tucson, emphasized the inherent injustice of basing law

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[7] James Bannon, statement, *Battered Women: Issues of Public Policy*, a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., Jan. 30–31, 1978, p. 27 (hereafter cited as *Consultation)*, p. 27.

[8] Kristen M. Williams, "The Role of the Victim in the Prosecution of Violent Crimes," publication no. 12, PROMIS Research Project (Washington, D.C.: Institute for Law and Social Research, 1978).

[9] Ibid., p. 34.

[10] Forst et al., *What Happens After Arrest?* p. 26.

[11] Vera Institute of Justice, *Felony Arrests: Their Prosecution and Disposition in New York City's Courts* (1977), p. 62 (hereafter cited as Vera Institute New York Study).

[12] Terry Fromson, "The Case for Legal Remedies for Abused Women," *New York University Review of Law and Social Change*, Spring 1977, p. 149.

TABLE 4.1
Disposition of Domestic Abuse Cases by Maricopa County Attorney

	No.	%
Turned down because elements of a felony were not present*	12	52.2
Turned down because victim was not cooperative	2	8.7
Turned down for failure to exhaust 3-week waiting period required by office policy	1	4.3
Turned down because charging attorney saw no reasonable likelihood of conviction	2	8.7
Charged	6	26.1
Total Cases:	23	100.0

* In 5 of the 12 cases turned down because the elements of a felony were not present, misdemeanor charges were later filed by the city attorney.

Source: In January and February 1980, Commission staff, under terms of a user agreement, reviewed all crime reports by Phoenix police officers for the month of April 1979 and reviewed case files in the city and county prosecutors' offices to determine case dispositions. Commission staff devised the forms and tabulated and analyzed the data.

enforcement decisions upon the past or present relationship between the assailant and the victim:

> [S]omething that cannot be emphasized too much is that we are talking about criminal conduct here. . . .We are talking about conduct that has been decided by the legislature of Arizona to be unacceptable conduct. . . .and there is no exception made for people who are married, people who live together, or people who were once married, even though that is the way it is treated, as if there is an exception, as if this is not criminal conduct.[13]

In spite of such criticism, some prosecutors persist in viewing incidents of violence within the family as private matters that waste valuable prosecutorial time and should be resolved outside the criminal justice system. One assistant district attorney quoted in the 1977 Vera Institute study put it bluntly: "I wish they would do something about people using the courts to settle their personal quarrels. . . .It's too bad there isn't a way to penalize these people."[14]

Other prosecuting attorneys do not deny that woman battering constitutes more than "personal quarrels," but contend that the importance of preserving the marital relationship between assailant and victim overrides other considerations unless severe injury results. One prosecutor summed up his reservations about bringing charges in such cases:

> You've got to weigh the considerations. Does the time-honored concept, the sanctity of marriage, override society's interest in the enforcement of the criminal law? I think that the sanctity of marriage is more sacred than the criminal law and the one punch fight. . . .Society protects that marriage. It overrides the criminal code.[15]

A similar attitude was expressed by a rural county prosecutor who testified at the Commission's Harrisburg hearing:

> I feel that since there is a relationship there between a husband and wife, and if they want to maintain it for any reason in the future, that that's a reason, I mean, they are married and I think that point is a distinction. If they want to live together, that's fine. If she wants to drop it because she wants to live with him, I'm not going to stand in the way.[16]

These attitudes tend to promote the development of law enforcement policies that measure out protection to citizens depending not upon the wrong they have suffered, but upon their relationship to the abuser.

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[13] Leslie Nixon, testimony, *Phoenix Hearing*, p. 235.

[14] Vera Institute New York Study, p. xii.

[15] Eisenberg and Micklow, "The Assaulted Wife," p. 158.

[16] Joseph Rehkamp, testimony, *Harrisburg Hearing*, p. 191.

Edwin Frownfelter, a legal services attorney testifying at the Commission's Harrisburg hearing, said:

> I am certain that there is almost a dual standard of justice where victims of intrafamily violence are concerned. An offense could be committed against a stranger in the street. I could walk up to a woman in the street and commit some kind of violent act towards her. I would be arrested on the spot, sent to jail, face a very serious punishment.
>
> I could do the same thing to my wife in our front yard and nobody would lift a finger to help her. . . .There is some reluctance on the part of members of the criminal system to get involved in what is really a highly volatile situation.[17]

A prosecutor's belief that preservation of the marriage is of utmost importance may be sincerely held. When that attitude influences the execution of his or her public duties, however, injustice can result. The class of crime victims suffering from this disparate treatment is one most in need of the law's protection. Whether or not such a result is intended, a prosecutor's reluctance to bring charges based upon the existence of a marital relationship may deny the victim the advocacy and support afforded to other victims of violent crime. Thomas Novak, a former Phoenix prosecutor and court commissioner and coauthor of a study on family violence in Maricopa County, Arizona, condemned this practice in his testimony:

> I think that [the motive of preserving the family] is just another excuse that they are using very, very honestly. . .to say, "We don't want to get involved in prosecuting this man, because if we prosecute him. . .for committing a crime then that is going to ruin his marriage."
>
> You know, we have to realize that what we are talking about is a person, a man who has committed a crime. And if they are saying that by us, the criminal justice system, interfering with that, stepping into it, that we are going to break up the relationship that they have and it's a relationship based on wife beating, then by gosh, maybe that relationship should be broken up. . . .[W]hat they are saying is that we are not going to—we don't want to do anything about it. We want to let him go on. . .beating her because they have got. . .a marital tie. I am sorry. . . .[18]

The nature of the preexisting relationship between abuser and victim in domestic violence incidents is also used by prosecutors to decline cases because they believe either that the victim triggered the assault or that she was at least equally responsible for it. Witnesses testifying before the Commission repeatedly recounted incidents in which prosecutors declined to bring charges against an abuser on these grounds. A legal services attorney described one case in which the victim herself was charged with assault:

> I had a client who was severely beaten by her husband. . .[W]e had a tremendous amount of evidence to support what happened. . . .[W]e have medical reports, photographs, everything, witness statements. She was severely beaten by her husband. . . .
>
> She was passed out. . . .She managed to call the police after she woke up and he was gone. . . .Then he came back and, you know, talked very sweetly and kindly to her and said he was going to bed. . . .
>
> She went to sleep. Later he woke up, came to her. . .and began to beat her again. In the meantime, however, she had called the police and told them to cancel her complaint. . . .So he got up and beat her a second time and then left the premises. . . .Six squad cars arrived and an officer came to her door. She had a broken nose, tremendously bruised spine and back, cuts, bruises all over her body, the photographs indicate.
>
> Officers came to her door, ordered her outside and told her that her husband had told them she had attacked him. . . .[S]he had defended herself during the attack by grabbing a cut piece of glass. . .and swinging at him. . .she had cut him on the leg. He had to get something like three stitches. . . .
>
> She was arrested for assaulting him. . . .They arrested her. They took her to jail. Kept her in jail overnight. . .and eventually the charges were dropped.
>
> And we are trying our best to get that law enforcement agency to institute charges against him.[19]

Even when the victim is not herself charged in the fight, authorities sometimes assume that she must have been a willing participant. The Vera Institute study cited earlier presumed the partial responsibility of the victim in setting forth some of the factors "typical of prior relationship cases":

> [F]irst, the victim was not interested in pressing for conviction and was reconciled with the assailant after the arrest had been made; second, *the victim was not entirely*

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[17] Edwin Frownfelter, testimony, *Harrisburg Hearing*, p. 198.

[18] Thomas Novak, testimony, *Phoenix Hearing*, pp. 248–49.

[19] Nixon Testimony, *Phoenix Hearing*, pp. 245–46.

innocent; and third, the passion of the relationship led to infliction of injuries in the attack. . . .[30]

Staff research in Phoenix revealed an example of the problems raised when a prosecutor measures a case according to the presumed responsibility of the victim. The police were summoned by the victim, who told them that she and her ex-husband had argued over custody of their daughter. The former husband pushed the victim back on a bed, waved a butcher knife in her face, and threatened to "cut her to ribbons." He then took the daughter and left. The police went to the ex-husband's residence to investigate, but he refused either to answer questions or to allow the officers to speak with the girl. When he became boisterous and headed for the kitchen, the officers arrested him.[31]

The following day the police department presented the case to the county prosecutor's office, recommending that the man be charged with reckless endangerment. The prosecutor declined the case, noting, "Because the facts are one against one, and the obvious animosity that exists between ex-husband and wife, there is little likelihood of conviction in this case."[32]

The charging prosecutor's analysis of these facts appears to presume that the victim and assailant were equal parties to the incident. It further indicates that the victim's description of the events was discounted because of her "animosity" toward the assailant, although the report nowhere indicates that he denied the allegations.

In another case, a woman was confronted on the street by a man with whom she had recently broken up after dating him for several months. He accused her of making telephone calls to his home and spreading rumors about him. When she tried to leave, he grabbed her by her hair and clothes, and slapped her three times in the face. She reported the assault to the police and denied making any telephone calls to him. The assailant was questioned by detectives, and he told them he had slapped her because of the annoying telephone calls. The police referred the case for prosecution.

When presented with the case, the county attorney's office declined to prosecute, saying that "even though suspect [was] wrong in slapping victim, she also committed a crime by making phone calls. This case appears to be something that can be handled outside of the court."[33]

In California, the *Santa Barbara County District Attorney Family Violence Prosecution Manual* advises prosecuting attorneys:

> Remember that "my spouse made me angry" is not an excuse for violence. The offender will minimize and deny responsibility for the violence by shifting it to the victim. Prosecutors and judges should be able to abide by this simple credo: Violence as a response to the stresses of life is not legally acceptable. Commitment to the prosecution of family violence cases must come from individual as well as policy-making prosecutors.[34]

This policy focuses the prosecutor's attention upon the behavior of the abuser and may help to discourage prosecutors from assuming that victims of domestic violence do not deserve the criminal law's protection because they are "not entirely innocent."

As noted throughout this report, law enforcement officials almost universally report that battered women are far less likely than other crime victims to press charges against their assailants. This opinion was expressed by police officials, prosecutors, and judges testifying before the Commission, and it appears to be confirmed by the results of some research studies. Less effort, however, has been devoted to discerning the effect this phenomenon has upon the criminal justice system's response to woman-battering cases.

The attitude of a crime victim toward prosecution greatly influences a prosecuting attorney's decisions on how to proceed with a case. Although under the American system of justice a criminal violation is considered a wrong against society as a whole, the needs and desires of the individual victim usually carry a great deal of weight, as the following remarks by a rural prosecutor make clear:

> COUNSEL. What is your position when a woman wishes to drop charges against her husband for assault or aggravated assault? What position do you take?

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[30] Vera Institute New York Study, p. 32.

[31] Case history from confidential police department report. In January and February 1980, Commission staff, under terms of a user agreement, reviewed all crime reports by Phoenix police officers for the month of April 1979 and reviewed case files in the city and county prosecutors' offices to determine case dispositions. Commission staff devised the forms and tabulated and analyzed the data (hereafter cited as Commission staff, "Phoenix Research").

[32] Ibid.

[33] Ibid.

[34] *Santa Barbara County District Attorney Family Violence Manual* (n.d.), p. 17.

> **Mr. Rehkamp.** I go along with it.
>
> **Counsel.** Do you ever attempt to dissuade her from doing that or to subpena her as a witness?
>
> **Mr. Rehkamp.** What I attempt to do is, if it is a private complaint, I tell them that I'll approve the complaint if they go through with the charge. In other words, before they actually file the charge, I tell them I want them to go through with it, and then, if they decide after that they want to drop it, depending on the charge, if it is a very serious offense, I'll try to get them to go into court but, if they don't want to do it, I'm not going to force them to do it. After all, they're the victim. . . .I haven't had occasion. . .to force a woman to testify against her will.[25]

Prosecutors and others frequently emphasize that victims of spouse assaults often change their minds within a few weeks after an assault and refuse to pursue a prosecution. In an attempt to screen out these cases before charges are filed, some prosecutors have required battered women to surmount certain procedural barriers not faced by other crime victims as a test of their willingness to follow through on a complaint. Such barriers may make the victim feel that she herself is on trial and that the prosecutor does not understand her situation, thus encouraging her to seek her own resolution to the problem and to drop the charges. In this case the prosecutor's restrictive policy becomes self-justifying and itself contributes to the problem of victim noncooperation.

As part of the INSLAW study of violent crime dispositions in the District of Columbia, prosecutors were asked to note their reasons for dismissing or declining prosecution in violent crimes cases. The statistics revealed that complaining witness problems accounted for over half of all turndowns and dismissals in crimes committed upon a family member or acquaintance. Complaining witness problems also cropped up, albeit to a lesser extent, in crimes between strangers.[26]

The expectation that women victims will become uncooperative witnesses comes into play even before the case reaches the prosecutor. A Phoenix police official testified that he believed that officers faced with the decision whether to arrest a wife abuser should consider the likelihood that a woman will later drop charges, even if she initially insists upon arrest.[27]

A similar dynamic can be found in the charging process. The expectation of noncooperation is so entrenched that prosecutors sometimes decline or dismiss cases for noncooperation when the victim is actually willing to go forward with the charges. The INSLAW study also surveyed witnesses who had been labeled "noncooperators" by prosecutors in Washington, D.C., during the first 6 months of 1973.[28] A wide discrepancy was found between what the prosecutors identified as noncooperation and the witness' actual attitude toward cooperating, as disclosed in subsequent interviews.

There were two reasons for the mislabeling of witnesses: (1) Prosecutors indicated noncooperation, not on the basis of perceived noncooperation, but in anticipation of it; and (2) prosecutors failed to communicate effectively with the witnesses:

> Inadequate communications between police/prosecutor and witness was a significant cause of prosecutors' labeling many witnesses as noncooperators during the period under study—not only because communications difficulties tended to discourage or "turn off" some *witnesses* from cooperating, but also because the system, by casting a false shadow of noncooperation on many witnesses, led the *prosecutor* to misinterpret their true intentions. A number of witnesses who were seemingly willing to cooperate were, unknown to themselves, classified by prosecutors as noncooperators.[29]

The study specifically noted the increased likelihood of predicting victim noncooperation when the victim and assailant are married, concluding that "the prosecutor may reject these cases at screening in anticipation of the victim-spouse losing interest in the case at a later stage."[30]

The problem of victim noncooperation is a frustrating one for many prosecutors, who tend to view cases that are dismissed prior to plea bargaining or trial as a waste of time and effort. This may not be true from the victim's perspective, since the filing of charges may gain her the time she needs to remove herself from the battering situation or may convince the assailant that law enforcement authorities stand ready to act decisively if he repeats his behavior. For the prosecutor, however, the institutional rewards depend upon obtaining a judgment or admission of guilt.[31] Thus, prosecutors resist filing charges in cases they suspect stand little chance of ending in a finding of guilt.

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[25] Rehkamp Testimony, *Harrisburg Hearing*, pp. 189–90.

[26] Williams, "The Role of the Victim in the Prosecution of Violent Crimes," p. 22.

[27] Robert Kornegay, testimony, *Phoenix Hearing*, p. 65.

[28] Williams, "The Role of the Victim in the Prosecution of Violent Crimes," pp. 30–31.

[29] Ibid., p. 31.

[30] Ibid., p. 29.

In domestic violence cases, prosecutors have devised procedures intended to screen out those cases in which the victim is likely to become uncooperative. One device is to "test" the victim's sincerity and tenacity by adopting a challenging attitude. The prosecutor may point out the hardships incumbent upon the complaining witness in a criminal case, including time lost from work and long delays, and may suggest that the final result is not worth seeking. A legal services attorney testifying at the Phoenix hearing described this practice:

> The county attorney has to decide whether to go ahead and prosecute, and they also subscribe to this belief that women do always drop. . .and given their caseloads and their priorities these things should be discouraged. So she will get a discouraging message from the county attorney. . . .[32]

In Phoenix, the city prosecutor's office sends victims of domestic violence (and occasionally victims in other kinds of cases, such as "neighborhood disputes") a letter notifying them that they must come into the office within 30 days to sign the complaint before a summons can be issued. If the victim fails to come in and sign the complaint, the report is returned to the police department with a notation that prosecution has been declined because of the victim's failure to sign the complaint. Commission staff reviewed reports of spouse assaults during April 1979 and found that 23 percent of all cases referred to the city prosecutor were declined for failure to respond to the letter.[33]

Another method intended to screen out waivering complainants is the imposition of a mandatory waiting period or "cooling off period" after the beating during which charges may not be brought. The Maricopa County Attorney's Office established such a policy in 1970, providing that no charges could be filed within 3 weeks of a domestic beating unless the victim had suffered severe bodily injury or unless there were imminent danger.[34] The policy was invoked more often under Arizona's pre-1973 criminal code, which provided that every assault by a man upon a woman constituted an aggravated assault and was a felony.

In 1973 the statute was amended to remove this provision.[35] As a result, many more cases of woman battering constituted misdemeanors and were handled routinely by the Phoenix City Attorney's Office, which had no "cooling-off" policy. Those cases coming to the attention of the county attorney (i.e., felonies involving serious bodily injury or use of a deadly weapon) still are subject to the 3-week cooling-off period, according to the prosecutors' policy manual in effect at the time of the Phoenix hearing.[36] Commission staff research revealed that it had been applied as recently as April 1979.

In that case,[37] police reports indicate that the assailant threatened the victim with a .38 caliber revolver and hit her with the barrel and butt of the weapon. One of the three children who witnessed the assault ran to a pay phone and summoned the police. The assailant was arrested and the gun impounded. The following day the police recommended prosecution for aggravated assault. The county attorney's office declined to bring charges because the 3-week waiting period had not expired. The police were instructed to contact the victim in 3 weeks and resubmit the report. When called the following month, the victim said she was again living with the assailant and would not assist in prosecution. In October the gun was released to the assailant because he "had no convictions for a crime of violence."

The county attorney's files revealed that the assailant was arrested again in November of that year for an aggravated assault upon the same woman. This time charges were filed against him.

This case history illustrates some of the adverse effects of a cooling-off period. The victim is left to deal with the assailant, who can be released on bail, in the best way she can for several weeks. During that time she is vulnerable to his threats or to his promises to reform and, unless other shelter is available, she may have to continue living under the same roof with him during the waiting period. Under these conditions she may well decide to drop the charges against him, a result that appears to justify the prosecutor's belief that she would not have been a dependable witness. The case is closed and the victim is left to risk further abuse.

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[31] B. Forst et al., *What Happens After Arrest?* p. 65.

[32] Nixon Testimony, *Phoenix Hearing*, p. 234.

[33] Commission staff, "Phoenix Research."

[34] Charles Hyder, testimony, *Phoenix Hearing*, p. 89.

[35] Ibid., p. 90.

[36] Ibid.

[37] Case history from confidential police department report. Commission staff, "Phoenix Research."

Waiting periods and other mechanisms intended to screen out waivering complainants may satisfy the prosecution's institutional goal of reducing the number of cases that fail before trial.[38] However, they operate to defeat the fundamental ends of the criminal justice system: to punish the wrongdoer, to vindicate the victim, and to deter further violations. These devices also serve to discourage battered women from relying upon the legal system for help.

As indicated above, prosecutors generally prefer to dismiss charges (or refuse to file) when they suspect that a victim may become uncooperative. An alternative, requiring her testimony under subpena, is rarely invoked although it can be effective in reducing victim noncooperation.

Prosecutors resist subpenaing victim witnesses, partially because they feel that they should not proceed against an assailant if the victim herself chooses not to testify voluntarily. As one prosecutor stated at the Harrisburg hearing, "If they want to live together, that's fine. If she wants to drop it because she wants to live with him, I'm not going to stand in the way."[39]

A pilot family violence project funded by the Law Enforcement Assistance Administration through the Santa Barbara County District Attorney's Office found one approach extremely helpful in encouraging victim cooperation. Legal services attorney Leslie Nixon described the process:

> They give [the victim] support. They emphasize to the woman and also to her husband that this is the State prosecuting him for unacceptable conduct. It is not the woman prosecuting him; she is the victim. She is a prosecuting witness, but it's the State that is sanctioning his conduct here.
>
> And when they portrayed it that way to the woman and they also agreed to subpena her testimony so that she can tell her husband, if she is still living with him, or her boyfriend or whoever he is, it is that "I have no choice. I am subpenaed. I have to go. It's not my prosecution. It's the State's prosecution."[40]

Approached in this way, subpenaing the victim's testimony can be a useful tool for prosecuting attorneys seeking to reduce case attrition without denying assistance to the victim.

When charges are brought against the abuser in a domestic violence incident, an issue arises as to the nature of the charge to be filed. In most jurisdictions the prosecutor selects the charge to be filed against an assailant.[41] Even where another official initially decides what charge is appropriate, the prosecutor usually has some influence over the decision. Prosecutors frequently charge spouse abusers with crimes less serious than their conduct seems to warrant.

Many factors can lead a prosecutor to decide to file a charge less serious than the incident would originally appear to merit. Among these are lack of evidence to support one or more elements of the more serious offense or newly obtained information on the extent of injuries inflicted. In many instances, however, the prosecutor's decision is based to a large extent upon what charge he or she believes the court will be willing to accept. Where that judgment takes into account the judiciary's traditional unwillingness to treat domestic assaults seriously, routine undercharging may result in spouse assault cases.

The prosecutor's charging function has an important effect upon police practices as well. When the prosecutor declines to file the charge recommended by the police and instead consistently files a lesser charge, the police will also treat the problem less seriously. Police officers' understanding of what constitutes serious offenses is often derived from the prosecutor's interpretation of the law. Particularly significant in this regard is the distinction between misdemeanor and felony assaults, since, as discussed in chapter 2, the officer usually has no authority to make an arrest for misdemeanor assault unless he or she actually witnesses the blow. If officers find that domestic assaults are overwhelmingly treated as misdemeanors, they may cease to make arrests in those cases.

Commission staff research in Phoenix identified several cases in which charges were reduced by the prosecutor after the police made seemingly appropriate arrests for felony assaults. In one case,[42] according to police reports, an assailant repeatedly punched a victim in the face, knocking her to the ground, and then kicked her in the face and abdomen. He grabbed her by the head and swung her from side to side, straining her neck, and beat her repeatedly in the face and body with a stick measuring 15 inches by 1-1/2 inches by 1 inch. Police officers arrived just after the beating concluded. They arrested the assailant and transported the victim to the hospital.

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[38] County Attorney Hyder's testimony questioned whether the imposition of a waiting period had any effect upon the likelihood that the victim would continue to press the case. He stated that "about the same ratio of women who wanted to carry through with the prosecutions would do it after the 3-week waiting period. . . ." Hyder Testimony, *Phoenix Hearing*, p. 89.

[39] Rehkamp Testimony, *Harrisburg Hearing*, p. 191.

[40] Nixon Testimony, *Phoenix Hearing*, p. 235.

[41] Frank W. Miller, *Prosecution: The Decision to Charge a Suspect* (Boston: Little, Brown, 1969), p. 154.

[42] Ibid.

After evaluating the evidence, the police forwarded the report to the county attorney with a recommendation that the assailant be charged with aggravated assault with a dangerous instrument. The county attorney's office declined to prosecute the case as a felony, stating that the victim's injuries were not sufficiently severe and that "the type of instrument used cannot be classified as a 'dangerous instrument' since a 15-inch stick is not readily capable of causing death or serious physical injury." The city prosecutor thereafter charged the assailant with a misdemeanor, but the case was dismissed when the letter requesting that the victim come in to sign the complaint was returned as undeliverable.

In another case,[43] police officers found the victim at a neighbor's house, her face badly bruised and bleeding. She reported that her husband had come home very drunk and had pushed her into a wall, thrown her to the floor, and kicked her repeatedly in the face and body while wearing cowboy boots. The victim was transported to the hospital. The officers, who had not witnessed the assault, arrested the husband for aggravated assault, citing in their report the portion of the Arizona assault statute that makes it a felony to assault a victim who is bound or "physically restrained."[44] They reasoned that a woman thrown to the floor and repeatedly kicked so that she could not rise was "physically restrained."

The county attorney's office did not agree, noting that the injuries sustained were not serious enough to support a charge of aggravated assault. The case was later submitted to the city prosecutor for consideration as a misdemeanor. The police officers in this case would have had no authority to arrest the assailant if they had interpreted the statute as the county attorney's office did.

In addition to discouraging the victim from seeking prosecution, the prosecutor may try to persuade her to utilize a diversion program[45] or civil process as a substitute. Advocates have observed that these diversion programs are fast becoming prosecutors' preferred remedy for battered women. Often, this results in failure to prosecute some serious assaults.

Much controversy surrounds the appropriateness of diversion programs where a violent act has occurred. Some advocates feel that these programs (discussed at length in chapter 6) have become "dumping grounds" for domestic cases. Nancy Sieh, attorney at the Santa Barbara District Attorney's Office, has identified some of the problems of diversion programs:

> The problem with these alternatives is that they are not based upon an understanding of the dynamics of domestic violence. Tight filing policies merely confirm societal beliefs that anything which occurs in the home is not properly the subject of outside inquiry. Mediation often merely confirms societal beliefs that violence at home is the fault of both parties and can be eliminated by agreement, as in negotiation between equals.
>
> These alternatives have only alleviated the prosecutor's caseload and the court's calendar of domestic violence cases, they have not curtailed domestic violence. While seeking appropriate alternatives in appropriate cases, we must also examine the given reasons for keeping domestic violence cases out of the criminal justice system.[46]

Beyond diversion programs, prosecutors are finding additional relief from domestic violence cases through the use of civil remedies. As discussed in chapter 2, States today are passing civil statutes to provide relief for victims in such cases. Such statutes typically include provisions whereby the abuser is directed to refrain from further abuse and is possibly excluded from the home until a hearing can be held. These "protection orders" are civil in nature, but breach of one usually involves criminal contempt. With the passage of civil statutes providing relief to battered women, however, prosecutors are directing women to file for civil relief rather than use the criminal process. Although the intent of such legislation was clearly to provide a temporary means of relief through protection orders, the result has been that the civil remedies now available are becoming the sole remedy for abused women.

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[43] Ibid.

[44] Ibid. See also Ariz. Rev. Stat. §13-1204(A)(8) (1978).

[45] Broadly defined, diversion is the formally acknowledged process of channeling complaints of criminal behavior away from the criminal justice system without findings of guilt or innocence or punishment imposed for the alleged criminal behavior. See chapter 6.

[46] Nancy Manners Sieh, "Family Violence: The Prosecutor's Challenges" (paper delivered at the National College of District Attorneys, career prosecutor course), pp. 1-2.

Witnesses testified that the major problem with relying on peace bonds or protection orders is that they either are not enforced or are not enforceable, and they are not necessarily available to all women. Injunctive relief is often limited by statute and, in many States, conditioned on divorce or separation.[47] This condition precludes many women from filing for civil relief:

> A woman in need of protection, who has put up with the "time consuming, expensive and humiliating" process of civil court, receives only a meaningless piece of paper which is not enforced by police and courts. The order may make a woman feel more secure, but it does so falsely and only temporarily, because the man will be free to assault her again and will do so.[48]

A number of prosecutor's offices across the country are currently experimenting with new ways of handling cases of woman abuse. One of the most promising is the family violence project of the Santa Barbara County District Attorney, mentioned above. Nancy Sieh described the program:

> The program funded in Santa Barbara County includes a three person team in the prosecutor's office to enable vertical case handling. The district attorney's family violence unit consists of a deputy district attorney, a criminal investigator and a clerical worker. Emphasis is placed on vigorous prosecution in severe cases and a diversion alternative in less severe cases. Considerable resources are expended in making filing decisions. The victim is always consulted and prepared for the nature of court proceedings and the likelihood that her feelings might change during the course of the prosecution.
>
> The unit is providing significant support services to the victim, including a "victim advocate" who is available to her on a 24-hour basis for support and referral to other agencies as needed. The victim advocate may accompany the victim through court proceedings if the victim so desires.[49]

Leslie Nixon, member of a family violence task force in Tucson, described another kind of support offered through the Santa Barbara program:

> [The Santa Barbara office] decided to have their prosecution goals be in line with the woman's goals as much as possible. In other words, if she decided, for instance, if it was a case that was not a real serious injury case, she decided that she would prefer not to see him in jail because he either was supporting the family or other emotional, or financial reasons or whatever, that she would not want to see him in jail, then the prosecutors would agree to seek a sanction, a punishment that was not involving a jail sentence. Either mandatory counseling, weekends in jail, a fine, something like that. Some kind of solution that did not require the person to be locked up.
>
> So they made these changes in these two offices and apparently the results have been astonishing. In a short period of time the rate for women dropping these prosecutions has gone to less than 10 percent, which is quite astonishing in any area of the law.[50]

These innovations have greatly increased the number of women willing to cooperate with law enforcement officials, although the program has other goals as well:

> Better results are not only measured by "successful prosecutions" but by the process of bringing a victim to a greater point of awareness which may enable her to follow through on a present or future incident. Better results are achieved when a victim learns that a concerned prosecutor is available and willing to assist her, breaking the cycle of hopelessness in her life. Some deterrent to a defendant's future violent behavior may result merely from prosecutorial intervention, though short of conviction.[51]

A support program similar to the Santa Barbara project is located in the Seattle City Attorney's Office. This project was formed to increase prosecution of misdemeanor cases and, in turn, to lower the incidence of domestic violence in Seattle. Established in June of 1978, the Seattle project was staffed with three full-time and one half-time paid staff members and volunteers to provide advocacy and information regarding the criminal process and to provide crisis intervention counseling and referrals.[52]

In Seattle in 1978–79, 266 victims appeared at trials, and 221 convictions (83 percent) were obtained. An additional 57 cases were successfully prosecuted without the victim's cooperation. In 1979–80, 330 victims appeared at trials, and 274 convictions were obtained (83 percent); an additional 85 cases were won without victim cooperation.[53] The Seattle project staff believe these figures indicate substantial success, but also underscore the need for continued efforts:

> These figures point out the need for continuing work within the community to assist and encourage women to seek their legal remedies and aid in prosecution of their

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[47] See discussion in chapter 2.

[48] Fromson, "The Case for Legal Remedies," p. 157.

[49] Sieh, "Family Violence," p. 9.

[50] Nixon Testimony, *Phoenix Hearing*, p. 236.

[51] Sieh, "Family Violence," p. 9.

[52] Sharon Euster, "Statistics Summary from the Battered Women's Project of the Seattle City Attorney's Office," 1980, p. 1.

[53] Ibid., pp. 4–5.

assailants. In terms of time, money, and morale, the Project has meant tremendous savings for the entire Criminal Justice system. The police and prosecutors are more encouraged that their work will yield results and so domestic violence is less likely to be ignored. The Courts are becoming more willing to get involved with the cases and thus begin to break the cycle of violence in the home.[54]

Marie Hegarty, a social worker and paralegal working with abused women in Philadelphia, emphasized the need for advocacy services to battered women seeking to use the criminal justice system:

> [B]asically. . .people don't understand the legal system. . . .[P]articularly in domestic cases where you have a victim who might have been. . .sitting in the waiting room with the defendant, which is. . .what usually happens, and is already very upset and very anxious and very distraught. It may be the first time she's seen him in the past 3 weeks. She's really very anxious, and it is real important. . .to explain to her exactly what's going on. . .that she really is safe here, that we have a Philadelphia police officer present and a sheriff's officer present and that I'm going to be there with her. . . .
>
> I think I just provide the clarification of the whole legal system for her in a lot of ways, and I think that. . .my presence in the whole system. . .provides a certain credence. . .on the level of the other court personnel, the commissioner, the other people, the attorneys there, that indeed the domestic cases now are being handled seriously, that there is a person now assigned specifically to handle these domestic cases. . . .[55]

Ms. Hegarty also testified on the effect that her support has on complainants' willingness to see the case through:

> COUNSEL. Do you think your presence results in a greater willingness on the part of the complainant to carry through with the procedure?
>
> MS. HEGARTY. I would say that there's a greater willingness for the client to show up from the time that she files her complaint, from the time that she comes to the arraignment. [F]or instance, I know that when I don't have a student doing a lot of these phone calls for me, and I'm tied up in other things and I can't contact these people in that 3 weeks, I have a significantly higher number of women who fail to appear. It is significant. Whereas, when I have a student doing all that preparation, calling those people, telling them that I'm going to meet them there, that this is what's going to happen, I do real well. . . .[A] significant number of them show up, so there's a big change there.[56]

These efforts promise significant improvements in case handling for the prosecutor willing to challenge the stereotypes regarding domestic violence. As stated in the family violence manual of the Santa Barbara project,

> It is particularly frustrating to perform admirably as a prosecution team only to find that the jury will not convict because "they are still in love," or that the judge will not impose an appropriate sentence because "this is just a family matter." Judges and juries share societal prejudices against interfering in a family dispute. Low conviction rates may persist while these views remain unchallenged. The prosecutor can be instrumental in educating the courts and community in bringing about a change in attitude toward the problem.
>
> Prosecutors have long been willing to lead public consciousness and assist in forming public opinion along responsible lines. In no area of crime is this more necessary than in family violence, precisely because the victim is motivated only by self-interest and is not concerned for the long-range protection of society. The prosecutor can and should provide this leadership.[57]

Findings

Finding 4.1: Prosecutors enjoy wide discretion to determine which criminal cases will be prosecuted and often accord low priority to cases involving domestic violence.

Finding 4.2: The rate of prosecution and conviction in criminal cases drops sharply when there is a prior or present relationship between the alleged assailant and the victim.

Finding 4.3: Some prosecutors hesitate to file charges against abusers, based on the belief that domestic violence is a noncriminal, personal matter or that prosecution would adversely affect the parties' marriages.

Finding 4.4: Prosecutors often treat victims of spouse abuse as if they, rather than the defendants, were accused of criminal conduct.

Finding 4.5: Prosecutors frequently attribute the low rate of prosectuion in spouse abuse cases to lack of victim cooperation, which may become a self-fulfilling prophecy. Prosecutors who believe that abuse victims will not cooperate with the prosecution of their cases frequently discourage the victims from using the criminal justice system.

Finding 4.6: Prosecutors rarely subpena victims to testify in abuse cases, although such action frequently could circumvent victim noncooperation.

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[54] Ibid., p. 6.

[55] Marie Hegarty, testimony, *Harrisburg Hearing*, p. 253.

[56] Ibid., pp. 253–54.

[57] *Santa Barbara Manual*, pp. 18–19.

Finding 4.7: Prosecutors frequently charge spouse abusers with crimes less serious than their conduct seems to warrant.

Finding 4.8: Some prosecutors have improved their handling of domestic violence cases by offering innovative support services to battered women.

Chapter 5

The Courts

Considerable confusion seems to exist about whether spouse abuse is a civil or criminal matter and which court is the appropriate forum. The question of whether civil or criminal remedies should be used is complicated by the fact that many jurisdictions have separate courts for civil and criminal matters. In Phoenix, for example, the family relations division of superior court handles civil remedies for battered women, whereas the justice courts, the municipal court, and the criminal division of superior court handle criminal remedies.[1]

Bebe Holtzman, an assistant district attorney in Philadelphia, described the forum problems she encountered prosecuting abuse cases in which protective orders had been violated:

> If I elect to proceed as a criminal complaint in municipal court, the municipal court judges in Philadelphia. . .do not have jurisdiction to hear the ontempt of court; however, they do have jurisdiction to hear whatever the accompanying substantive charges would be, such as simple assault or defiant trespass or whatever act constituted the contempt of court. . . .
>
> . . .[I]nitially, when I would transfer a case to family court, the family court judges that had issued the original orders were refusing to hear the contempts and were transferring them back to municipal court, at which point the muncipal court judges were transferring them back to family court. I finally wrote a letter to the chief administrative court judge of family court, and indicated that the orders were being vitiated by the behavior of various judges, at which point he did issue an administrative order which forced the family court judges to hear their own contempts in appropriate cases.[2]

The approaches to domestic violence taken in civil and criminal courts theoretically are quite different. Golden Johnson, a former judge from Newark, New Jersey, discussed these differences as they applied to the court system in New York:

> [A]djudication in criminal court is for the distinct purpose of punitive action against the offender and is not designed necessarily to discuss family problems, keeping the family unit intact, or giving counseling service or any kind of support services that are in fact available at the family court system.[3]

Although civil and criminal remedies can be used as complementary parts of a coordinated system for combating domestic violence, courts in many jurisdictions exhibit a preference for one or the other. Nearly 5 months after New York law was changed to give victims the choice of whether to pursue their abuse complaints in family court or in criminal court, legal services attorney Marjory Fields reported that: "Judges continue to refer battered wives' complaints to family court even though this transfer power was repealed effective September 1, 1977, and the prosecutors show them the new law."[4]

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[1] Irwin Cantor, Alan Hammond, and Ronald Johnson, testimony, *Hearing Before the U.S. Commission on Civil Rights, Phoenix, Arizona*, Feb. 12–13, 1980 (hereafter cited as *Phoenix Hearing*), p. 114.

[2] Bebe Holtzman, testimony, *Hearing Before the U.S. Commission on Civil Rights, Harrisburg, Pennsylvania*, June 17–18, 1980 (hereafter cited as *Harrisburg Hearing*), pp. 254–55.

[3] Golden Johnson, statement, *Battered Women: Issues of Public Policy*, a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., Jan. 30–31, 1978 (hereafter cited as *Consultation*), p. 60.

Dauphin County, Pennsylvania, legal services attorney Nancy Rourke noted that her jurisdiction exercises a preference for civil remedies to the exclusion of criminal ones:

> In our county we can get protective orders, so the police start thinking that you have to have a protective order. And then we have to go out and explain to the police that that's wrong, that you can still bring the criminal charge. It is also a carryover of the attitudes that existed prior to the passage of the Protection From Abuse Act.[5]

On the other hand, Cumberland County, Pennsylvania, legal services attorney Lawrence Norton explained that the use of criminal remedies in his jurisdiction is favored, although this route is not always effective:

> The fact that [some] judges or other law enforcement people will be pushing the criminal system doesn't necessarily mean that system is working or that there's a feeling that it will work. . . .[T]here are some instances where I question the good faith of that. It is a barrier that is put up.
>
> I don't think the criminal system works very well to solve the problem, and I don't take the fact that the judge in our county would respond by saying, "That's the way I want it pursued," to mean that it's working well or that it is being pursued in the county because it's not.[6]

Judge Irwin Cantor, who heads the domestic relations division of superior court in Phoenix, described the sanction imposed on men who violate court orders directing them not to abuse their wives:

> JUDGE CANTOR. The most common is that we find him in contempt, that he may purge himself of contempt by not doing this again—the most common. We do have the power all the way to incarceration. . . .
>
> COUNSEL. Could you give us an idea of how often, in the time you have been on the bench, you have ordered incarceration for a violation of an order not to assault or harass a spouse?
>
> JUDGE CANTOR. It is very rare. I don't know numbers, but the problem I have with it is that once we do it in civil court that we are taking on a criminal sanction, and none of the safeguards of the criminal law are there. One, he can be called for cross-examination, [which is a] violation of [the] fifth amendment, [and he is] not entitled to a jury trial, another constitutional right. He may or may not have an attorney. Many of these men do not have attorneys, so we do use [incarceration] rarely. If it is amounting to what would be a criminal crime, then it should be referred to the criminal divisions and through the prosecutor.
>
> COUNSEL. But doesn't the failure to enforce the court orders contribute to their ineffectiveness and create an opinion in people's minds that they are worthless?
>
> JUDGE CANTOR. No, because I think you have other sanctions. To me, when you incarcerate, it is like an act of war. You should have the power but you only do it as a very last resort.[7]

Some domestic violence legislation mixes both forums by providing a criminal remedy for the violation of a civil order. The question of whether this is workable appears to arise often in the minds of those charged with enforcing laws to protect battered women. Stephen Neeley, county prosecutor in Tucson, was asked to address this issue:

> The suggestion that the due process guarantees do not obtain is absurd. Those issues have been litigated year after year after year, and there is a very definitive process that a judge uses to hold somebody in contempt whether it's civil or criminal, sanctioned by the Supreme Court of the United States and by the common law and everything else, and anybody who suggests that is the problem is just making excuses.[8]

The odds against a spouse abuse case ever reaching the courtroom have been estimated at 100 to 1.[9] At every step, battered women are discouraged or prevented from proceeding, and few get past the barriers set up by unsympathetic or misguided police and prosecutors. As shown in previous chapters, the police often fail to take spouse abuse incidents seriously, and many victims, torn by economic and emotional dependence on their abusers or frightened by the consequences of testifying against them, choose to drop charges. As a result, judges see relatively few of the battered women who turn to the justice system for help.

In Pennsylvania, for example, Judge John Dowling of the Dauphin County Court of Common Pleas testified that approximately 50 civil and criminal cases of spouse abuse came before him each year and that perhaps no more than 15 of those actually proceeded to trial.[10] He estimated that full hearings were held in only one of every three civil cases in which protection orders were sought because the majority were settled out of court.[11] In Arizona, Judge Alan Hammond of the Phoenix municipal court said that criminal spouse assault cases were "relatively rare" in his court and that "very few actually proceed[ed] to trial in court in relation to [the] volume of the other cases handled." He polled several other Phoenix judges and found it "their best recollection that they might have two or three cases involving domestic violence within the last year which actually proceeded to trial."[12]

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[4] Marjory Fields, statement, *Consultation*, p. 259.

[5] Nancy Rourke, testimony, *Harrisburg Hearing*, p. 169.

[6] Lawrence Norton, testimony, *Harrisburg Hearing*, p. 169.

[7] Cantor Testimony, *Phoenix Hearing*, pp. 121–22.

[8] Stephen Neeley, testimony, *Phoenix Hearing*, p. 225.

[9] Del Martin, statement, *Consultation*, p. 213 citing Sgt. Barry Whalley, Oakland Police Department.

[10] John Dowling, testimony, *Harrisburg Hearing*, pp. 68–69.

In a 1975 speech before the American Bar Association, Detroit Deputy Police Chief James Bannon discussed this pattern:

> The attrition rate in domestic violence cases is unbelievable. In 1972, for instance, there were 4,900 assaults of this kind which had survived the screening process long enough to at least have a warrant prepared and the complainant referred to the assault and battery squad. Through the process of conciliation, complainant harassment, and prosecutor discretion fewer than 300 of these cases were ultimately tried by a court of law. And in most of these the court used the judicial process to conciliate rather than adjudicate.[13]

In Phoenix, Capt. Glenn Sparks testified that in nearly a quarter-century as a police officer, he had never had a case of domestic violence go to court,[14] and Assistant City Prosecutor Joseph Tvedt reported that more than half of the victims failed to sign complaints once they were approved by his office.[15] In Harrisburg, Gloria Gilman, director of the Domestic Abuse Clinic for Women Against Abuse of the Philadelphia District Attorney's Office, testified that a large percentage of women who were eligible for protective orders against their spouses were unable to enter the court system, because there were not enough attorneys available who would represent them and because "the courts are swamped with petitions and they only want to hear so many."[16]

The Minor Judiciary

Those few cases that do enter the judicial system are likely to be resolved at entry-level courts. In Harrisburg, for example, the most common charge in cases of domestic violence is harassment, a summary offense for which the final arbiter is a district justice.[17] In Philadelphia, arraignments are held before a trial commissioner, whose responsibility is:

> to either negotiate the case there, to try to resolve it, to arbitrate the case between the two parties, which comes out to being called withdrawing the case without prejudice; or [the commissioner] has the option to list the case into municipal court; or if the complainant chooses to drop the case completely, the complainant can also do that. So the commissioner's responsibility basically is to present those options to the complainant and to hear both sides of the story and to come to some sort of resolution.
>
> [T]here is a tendency to have the matter settled at that level.[18]

Depending on the statutory authority in particular jurisdictions, magistrates and justices of the peace may greatly influence how incidents of spouse abuse are treated in the court system. These members of the minor judiciary often hold arraignments, set bail, determine the nature of charges to be brought, decide whether to bind cases over to higher courts, make findings of guilt or innocence, and mete out sanctions. Even in the relatively minor act of setting bail, a magistrate's actions may have significant consequences in an abuse case; unless the bail is set high enough to keep the abuser incarcerated until his preliminary hearing, he will be free to return home to intimidate his victim in an effort to convince her to drop the charges.[19]

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[11] Ibid., p. 70.

[12] Hammond Testimony, *Phoenix Hearing*, p. 115.

[13] James Bannon, "Law Enforcement Problems with Intra-Family Violence" (speech delivered to the American Bar Association Annual Meeting, Montreal, Aug. 12, 1975), p. 5.

[14] Glenn Sparks, testimony, *Phoenix Hearing*, p. 42.

[15] Joseph Tvedt, testimony, *Phoenix Hearing*, p. 82.

[16] Gloria Gilman, testimony, *Harrisburg Hearing*, p. 229.

[17] Richard Lewis, testimony, *Harrisburg Hearing*, p. 56.

[18] Marie Hegarty, testimony, *Harrisburg Hearing*, pp. 251–52.

[19] The purpose of bail is to ensure a defendant's appearance in court. Johnson v. State, 30 Ala. App. 593, 10 So.2d 298 (1942); Mitchell v. City of Dothan, 249 Ala. 253, 30 So.2d 735 (1946); U.S. v. St. Clair, 42 F.2d 26 (C.C.A. Neb. 1930). However, some courts have held that a trial judge may deny bail if he feels the release of the accused will endanger the safety of the community or of witnesses. Wansley v. Wilkerson, 263 F. Supp. 54 (W.D. Virginia 1967); Nail v. Slayton, 353 F. Supp. 1013 (W.D. Virginia 1972); Mastrian v. Hedman, 326 F.2d 703 (C.A. Minn. 1964), *cert. denied*, 376 U.S. 956, 84 S.Ct. 1128; U.S. v. Gilbert, 425 F.2d 490 (138 App. D.C. 59, 1969); Corbett v. Patterson, 272 F. Supp. 602 (D.C. Colo 1967); People ex rel Hemingway v. Elrod, 60 Ill. 2d 74, 322 NE2d 827 (1975); State v. Dodson, 556 SW2d 938 (Mo. App. 1977). Some courts and writers recognize a constitutional problem with pretrial detention in light of the presumption of innocence. Commonwealth v. Truesdale, 449 Pa. 325, 296 A2d 829 (1972); Sprinkle v. State, 368 So.2d 554 (Ala. App. 1978), *cert. quashed* (Ala.) 368 So.2d 565; Stack v. Boyle, 324 U.S. 1 (1951); Jeff Thaler, "Punishing the Innocent: The Need for Due Process

In Pennsylvania, district justices are empowered to receive criminal complaints from private citizens. One justice testified that, to cut down on the number of withdrawn charges, he had instituted a waiting period for abuse victims who wanted to file private complaints. When a victim calls or comes into his office, unless her case appears to be "severe," she is given an appointment "2 or 3 days down the line [to give her] a little thinking time, a little cooling-down time."[20]

Private, or "walk-in," complaints are made at the district justice's office, where the complainant is interviewed, sworn, and asked to sign the complaint. At that time the justice formulates the charges, deciding whether the offense is harassment, simple assault, or aggravated assault.[21] The district attorney may decide, based on the evidence, to raise or lower the charge recommended by the district justice in a private complaint.[22] This practice differs from that followed in police-initiated complaints, which do not need approval from the district attorney. Once the justice holds a preliminary hearing to determine whether a *prima facie* case has been made, however, the district attorney cannot upgrade the charges.[23]

Assault charges must be forwarded to the district attorney's office, whereas harassment charges, being summary offenses, are resolved at the district justice level. This factor may have a bearing on what charge the justice decides to bring:

> [W]hen a woman is told that she can file charges by a police officer, she will go to a district justice and be discouraged from filing, or. . .if he does allow her to file a charge. . .he always tries to make it a summary kind of charge that he himself can dispose rather than have to go through the district attorney's office, and. . .that is a systemic matter.[24]

Harassment charges, which may be initiated through citations issued by police officers or by private complaints filed by victims, are used often in Pennsylvania for abuse cases that police officers or district justices do not perceive as being serious. According to Sgt. Peter Brooks of the Harrisburg Police Department, officers are rarely called to testify in harassment cases:

> Usually, on the initiation of summary charges at the scene of a domestic problem, the district justice won't even subpena the officer. He will handle the citation with the parties that are involved. That's when the offense is determined as summary.[25]

One district justice testified that he generally allowed a first offender to plead guilty to harassment and pay a $25 fine, plus costs, without a hearing on the facts of the case.[26] Examination of dispositions of harassment charges in Harrisburg during 1979 and 1980 showed the average fine, in those cases in which the amount was noted, to be $58; this figure included court costs of $26.50. With costs subtracted, all but four of the known fines amounted to $26 or less. Only 5.6 percent of the convicted defendants were incarcerated.[27]

Although district justices have the power to influence the course of an abuse case, they are limited in their ability to provide actual remedies for battered women. If the police arrest an abuser and bring him in to be arraigned, the justice may require the defendant to post bail,[28] but the standards to be used by the district justice in determining the amount of bail are based on ensuring the defendant's appearance at trial, rather than preventing further criminal activity.[29] If the police do not make an arrest, but simply refer the victim to the district justice to file a private complaint, the criminal law offers little hope for an immediate remedy. Previously, a district justice could issue an arrest warrant in such a case, but that authority was limited when the Pennsylvania Criminal Code was changed in 1979.[30] Now, instead of a warrant, in most circumstances the justice must issue a summons, directing the accused to appear before the justice on a named day to answer the charge.[31] Mabel Shoemaker, a district justice in Chambersburg, Pennsylvania, testified to the frustration she experienced as a result of the change:

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and the Presumption of Innocence Prior to Trial," *Wisconsin Law Review*, 1978, pp. 441–84. However, the Supreme Court recently held that the presumption of innocence is only applicable in allocating the burden of proof at the trial, and not in determining rights of pretrial detainees. Bell v. Wolfish, 99 S.Ct. 1861 (1979).

[20] Joseph Pinamonti, testimony, *Harrisburg Hearing*, p. 75.

[21] Paul Hardy, testimony, *Harrisburg Hearing*, p. 72.

[22] Lewis Testimony, *Harrisburg Hearing*, p. 57.

[23] Ibid.

[24] Ida Farber, testimony, *Harrisburg Hearing*, p. 25.

[25] Peter Brooks, testimony, *Harrisburg Hearing*, p. 47.

[26] Pinamonti Testimony, *Harrisburg Hearing*, p. 74.

[27] Commission staff research, conducted in May 1980, in the course of field investigations, at the Harrisburg Police Department.

[28] 42 Pa. Cons. Stat. Ann. §1515(a)(4) (Supp. 1980).

[29] *Id.;* Pa. R. Crim. Proc., Rule 4004 (Supp. 1981). See footnote 11.

[30] Pa. R. Crim. P. Rule 102 (Supp. 1981).

[31] *Id.*

> [O]n. . .the harassment charge, which is what we take a great many of these cases on, where a wife has been slapped or pushed or shoved, there [have] been no broken bones, the eye isn't too black, and—or not too much bodily injury has been [inflicted], the trend is to take it on harassment, but we still cannot issue that warrant. It must go out as a summons unless we believe that he will not answer the summons. . . .
>
> Now, I can understand why a summons should go out in a great many cases, when it doesn't involve abuse or physical contact in any way. But I feel very strongly that the man who comes home and beats his wife on Saturday night and she can't get out, there should be—and it should not be abused—the right for the district justice to type up a complaint or the police to come in and say, "We're getting this man out of here until everybody cools down and she gets treatment at the hospital."
>
> We get in a very embarrassing and, I think, an unfair position when a woman calls. . .on the phone and she says, "My husband is beating me," and she is screaming; kids are screaming in the background. All of a sudden you hear terrified scream, and the phone is jerked off the wall.
>
> What do I say to her? The police officer here knows I can call him. I may beg him to go out, just go out and see what's going on. So a day or two later, she's taken from the hospital, comes to our office where we see a very badly bruised and battered woman who was not able to get any help that night, and it is frustrating, and I think it is grossly unfair.[32]

Justice Shoemaker testified that before the law was changed a district justice could issue a warrant and have the abuser "picked up and put in jail until he cooled off." She saw this as "a relatively inexpensive way to dispose of a wife beater."[33] Now, however, when an abuse victim seeks help in an abuse case, there is little under the criminal laws the district justice can do expeditiously. This, according to Justice Shoemaker, results in the reluctance of victims to initiate or follow through on charges:

> [We are hearing fewer] severe abuse cases. . .because they think, "What's the use? We can't get any help." I know they call the police. The police say, "See the magistrate." What can I do? As a district magistrate, what can I do to help the woman who is being beaten when at first I have to take the complaint and then call the district attorney for approval or call the judge who may say, "Go ahead and take the complaint. See me Monday morning.". . . A severely abused wife cannot wait until Monday morning.[34]

Although the criminal law in Pennsylvania provides few tools with which district justices can fashion immediate remedies in the absence of an arrest by the police, the civil law offers some assistance. Under the Protection From Abuse Act,[35] district justices may issue protective orders evicting abusers from their homes and prohibiting them from further abusing their victims.[36] The justices' jurisdiction under the act is limited to weekends, when the courts of common pleas are not in session.[37] In practice, however, few district justices exercise even that limited jurisdiction.

Some justices may fail to use the Protection From Abuse Act because it is relatively new and they do not yet fully understand how to use it,[38] but many district justices do not use the act because judges in their counties have instructed them not to do so.[39] Justice Shoemaker, for example, testified that district justices in her county did not handle cases under the act for that reason:

> COUNSEL. How did you come to know that you were not to handle it?
>
> JUSTICE SHOEMAKER. Those were the judge's orders.
>
> COUNSEL. Okay. Do you know if that's the practice in other counties or not?
>
> JUSTICE SHOEMAKER. Some counties. I believe, from being at [district justice] school. . .this spring. . .some of the district justices were using them and others were not. I assume that it is the president judge's choice. He makes the decision.[40]

Robert Frederick, a police consultant and former police captain who developed a police training program for the Pennsylvania Coalition Against Domestic Violence, responded to this testimony as follows:

> Not being a lawyer I don't know how to go about getting judges to obey the law, but I know a number of them that don't.
>
> I. . .listened to a district justice here say that the judge was her boss, and he had said she shouldn't use the Protection From Abuse Act. Her boss, it seems to me, is

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[32] Mabel Shoemaker, testimony, *Harrisburg Hearing*, pp. 204–05.

[33] Ibid., p. 210.

[34] Ibid., pp. 210–11.

[35] 35 Pa. Stat. Ann. §10181 (Purdon 1978).

[36] *Id.*, §10186(a)(1)-(3).

[37] *Id.*, §10188.

[38] Pinamonti Testimony, *Harrisburg Hearing*, p. 77.

[39] See, for example, Edwin Frownfelter, testimony, *Harrisburg Hearing*, p. 204; Joseph Rehkamp, testimony, *Harrisburg Hearing*, p. 209; and Farber Testimony, *Harrisburg Hearing*, p. 30.

[40] Shoemaker Testimony, *Harrisburg Hearing*, p. 194.

> the people who elected her to office, and I don't think any other elected or appointed official has a right to tell her that she cannot use the law. The law specifically provides for her to take action on the weekend. . . .She has [the tool], and her judge won't let her use it.[41]

Stover Clark, police and court liaison for the Pennsylvania Coalition Against Domestic Violence, testified about the difficulty he encountered trying to persuade district justices to change the way they approached cases of spouse abuse:

> My experiences with district justice training, speaking to their monthly meetings, have been horrendous. They are very unreceptive to having outsiders come in and tell them about new laws or how they should use the law, and it's a hard road we're going to have to follow to get to the district justices. I think we're going to have to do that through the county system, basically.[42]

Magistrates and justices of the peace in Arizona experience a similar inability to shape an immediate remedy in spouse abuse cases. Although they may require a defendant in a criminal case to reside away from home as a pretrial condition of release, they do not have authority to issue protective orders, which could require the defendant to refrain from further abuse. Statutes and rules of court provide for a defendant to be released pending trial on his own recognizance, without posting a money bond, unless he seems unlikely to appear in court when required.[43] This means that a magistrate may not keep an abuser in jail by setting a high bail based on the potential danger to the victim.

One rarely used and controversial option available to magistrates and justices of the peace for spouse abuse cases is the peace bond. Golden Johnson, a former judge from Newark, New Jersey, described the peace bond as follows:

> Another remedy that is allegedly available in some States is the so-called peace bond. This remedy is available in California and Michigan, where its effectiveness is generally considered to be nonexistent. A peace bond is a surety, usually a bond which is imposed in a quasi-criminal proceeding. It is rarely used and when imposed, the money is rarely posted. Usually, the peace bond has not been fully explored.
>
> Another problem is the possible constitutional violation of when the persons are arrested or put in prison for nonpayment of these bonds, they are not provided the right of trial by jury, when they allege unequal treatment of persons not able to post these bonds. And also whether or not a question of double jeopardy [arises] when a later conviction of wife abuse is conclusive evidence of the violation of the effect of the peace bond.[44]

Under Arizona's peace bond statute, a person who has "threatened to commit an offense against the person or property of another"[45] may be required to post a money bond of up to $5,000 to keep the peace.[46] If the person later is convicted of an offense amounting to a breach of the peace, the county attorney must initiate action upon the bond.[47] The peace bond is not self-enforcing, and the county attorney in Phoenix has adopted a policy of not initiating actions under the peace bond statute.[48] He explained the considerations behind this policy as follows:

> When we got the peace bonds, we found that [in] the majority of those cases, that the individuals who had the peace bonds against them moved right back in or continued to live with the woman, or she continued to see him, and would never report to the police that she was being harassed or threatened or bothered until perhaps she was abused again.[49]

Stephen Neeley, county attorney from Tucson, testified that although his office occasionally initiated proceedings under the peace bond statute, he found it to be ineffective and oppressive to the abusive husband, who is already under an emotional strain that may prompt further abuse.[50]

Justice of the Peace Ronald Johnson does not agree. He is the only justice of the peace in Phoenix to use peace bonds, and he sees a role for them in cases of domestic violence.[51] Invoking the peace bond statute makes it possible for a justice of the peace to provide a forum in which a battered woman does not have to retain an attorney, pay court costs, or get involved with the police or the prosecutor's office. Although a peace bond may not stop a person bent on harming another, it does provide official condemnation of abusive conduct, which may deter further violent behavior. So long as the amount of the peace bond is not in excess of what the abuser can afford to pay, it does not appear to be unnecessarily oppressive. Justice Johnson, for example, reported that he generally set the amount of the bond at $5 or $10.[52] He testified that without the peace bond he would have no way to help battered women:

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[41] Robert Frederick, testimony, *Harrisburg Hearing*, p. 213.

[42] Stover Clark, testimony, *Harrisburg Hearing*, p. 215.

[43] Ariz. Rev. Stat. §13-3967 (1978).

[44] G. Johnson Statement, *Consultation*, p. 60.

[45] Ariz. Rev. Stat. §13-3811 (1978).

[46] *Id.*, §13-3813.

[47] *Id.*, §13-3815.

[48] Charles Hyder, testimony, *Phoenix Hearing*, p. 95.

[49] Ibid.

[50] Neeley Testimony, *Phoenix Hearing*, p. 215.

[51] R. Johnson Testimony, *Phoenix Hearing*, p. 139.

> I've got to maintain the peace. I've got to put down every riot and fray and confrontation in the community, but how do you do it when you're strapped with one tool, and that is a peace bond that people in the higher levels are saying [is] unconstitutional. . . .
>
> But. . .that's the only tool as a JP that I've got to maintain the peace within my precinct. I don't know how superior court judges [or] city judges overall feel about domestic violence. I do know that JPs are inherently concerned because we. . .are the courts that are in the neighborhood, and they run into us for protection.[53]

Relief Involving the Criminal Justice Process

When an abused woman turns to the legal system for help, there are several courses of action she may follow. She may file criminal charges; or, depending on the laws in her State, she may seek a civil remedy, such as a divorce or a protective order. Each of these avenues offers some advantages to the victim, and each has drawbacks. The nature of a victim's situation determines what combination of remedies is most suitable for her.

If a battered woman seeks a criminal remedy against her abusive spouse, she must weigh several factors. Successful criminal prosecution may serve as a deterrent to future abuse, and it punishes the abuser for his violent behavior. Moreover, as long as the defendant is incarcerated, he is unable to abuse his victim. In Pennsylvania, Judge Dale Shughart, president judge of the ninth judicial district, testified that, in his opinion, criminal remedies were effective in dealing with spouse abuse:

> [I]n a criminal case, the court has the power of suspending sentence, pending compliance with certain conditions, and, if there is a violation of those conditions, then a jail sentence can be imposed; and putting people in jail is a pretty effective way of stopping them from committing violence.[54]

Judge Alan Hammond of the Phoenix Municipal Court testified that even without a jail sentence, the criminal process can be effective in abuse cases through the use of terms of probation:

> I'm a very strong believer that probation can be a very effective tool in this particular area. Incarceration is only temporary, and even if someone were to receive the maximum sentence on a misdemeanor, they'd be out in 180 days. Three-year term of probation has a lot more flexibility even if it does include a jail sentence, but in order to make that an effective term of probation, you have to have an effective probation department.[55]

Creative use of the criminal process was cited by Del Martin, noted author and expert in the area of battered women:

> An innovative judge in Hammond, Indiana, has named the wife/victim her husband's probation officer. The rationale is that the man won't hesitate to beat up his wife, but he might think twice about beating up an officer of the court.[56]

Although there are clear advantages to filing criminal charges, criminal remedies have many inherent drawbacks that may deter some battered women from pursuing them. The criminal process is a slow one, and if the abuser is released on bail pending trial, the victim may be subject to renewed attacks. If, on the other hand, the abuser is incarcerated, it may mean a loss of income to the victim and her children—in addition to the cost to the family of attorney and court fees.

Several witnesses expressed a lack of confidence in the criminal route. Legal services attorney Edwin Frownfelter, for example, testified:

> Prior to the passage of the Protection From Abuse Act, the criminal remedies were really the only thing that an abuse victim had available to her, and for a while I was recommending that she file concurrent charges: file the harassment charges and file the abuse petition and pursue both of them for the benefits of each. Our experience with the criminal charges was not very good, frankly.
>
> Oftentimes, a criminal complaint would be filed and the district justice would then tell the victim, "All right, we'll issue a summons and mail it out to him," but it could be a lapse of several days before he even receives any evidence that criminal prosecution has been commenced, and during this time all sorts of violent behavior could be happening, or the effect of it could be greatly diminished.[57]

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[52] Ronald Johnson, Justice of the Peace, Phoenix South Justice Court, interview, Jan. 10, 1979 (hereafter cited as R. Johnson Interview).

[53] R. Johnson Testimony, *Phoenix Hearing*, p. 139.

[54] Dale Shughart, testimony, *Harrisburg Hearing*, p. 105.

[55] Hammond Testimony, *Phoenix Hearing*, p. 137.

[56] Martin Statement, *Consultation*, p. 14.

[57] Frownfelter Testimony, *Harrisburg Hearing*, p. 199.

The length of time between the filing of charges and the trial can be substantial. Judge Harold Sheely of Cumberland County, Pennsylvania, estimated that it might be 3 or 4 months before a criminal charge for wife beating reached his courtroom.[58] A witness told the Commission's New Hampshire Advisory Committee that the lapse in misdemeanor assault cases was 3 months to a year.[59] In the District of Columbia, Assistant U.S. Attorney Gordon Rhea described time lapses as follows:

> It used to take a year to get a misdemeanor to trial, now it takes only two to three months, because. . .the court set up a new case assignment system that delegates six permanent judge positions instead of the previous random assignment system. Now about half the cases pending are two months old, and three-fourths of the cases are less than four months old.[60]

Judge Golden Johnson pointed out some problems caused by delays between the violent incident and the trial:

> So it is. . .important to know what your rights are or what you ought to be doing at the time in which this injury occurs and whether or not you should have witnesses, or neighbors, or take pictures or things of that nature. So that if, in fact, your case be brought to the proper authorities—and it takes a while to get there—that you still will be able to refer to injuries or visible injuries that you received, rather than talk about something that no one else can see, the judge can't see, the prosecutor can't see, and the husband will allege never were present.[61]

One of the chief drawbacks to the criminal route in abuse cases is the fact that a man arrested for beating his spouse generally is released almost immediately on bail or on his own recognizance. At that point, he may return home angrier than ever and renew his violent behavior. According to Carlisle District Attorney Edgar Bayley, most defendants are released on bail:

> I find that problem with murderers and rapists and robbers and every other type. You know, a person in Pennsylvania, except for capital offenses, is entitled to bail. To the extent they can make bail, they have an absolute constitutional right to be out on the street. Most assault cases, people will initially be able to make bail. That is a problem, but you can't put people away in jail pending disposition of a criminal charge.[62]

Although one participant told this Commission's Connecticut Advisory Committee that "high bail was set at the time of the booking in cases where the man was likely to return and threaten or continue to abuse the woman,"[63] others disagreed, saying that "offenders were routinely released on low bail regardless of potential danger to the victim."[64] In Phoenix, shelter director Joanne Rhoads testified that if her clients pressed charges against their abusers:

> usually the man was out on bail in a very short period of time, an arraignment wouldn't take place for about 6 weeks, and the woman would have to live at home with that man until she was sought to testify against him. . . .[65]

District Attorney Bayley defended the bail process, saying:

> In fact, lots of good things can occur if the person starts getting assistance or help while they are on bail, which is often the case also. For example, let's say a defense attorney becomes involved in a case and he knows he's going to have to plead his client guilty and he knows there's a problem. He might well have his client initially start psychiatric counseling, psychological counseling, alcohol work, all those sorts of things that will. . .impress a judge who ultimately has to decide the case as to what happens to his client. So there can be positive factors even though somebody is out on bail.[66]

Other disadvantages to the criminal route are the stigma and loss of the breadwinner's income that may result from a criminal conviction. A prosecutor spoke before the Commission's New Hampshire Advisory Committee about the issue of jail for guilty assailants:

> Oftentimes, the woman opposes such a recommendation because there will be a loss of financial support, it would be socially embarrassing, and lifetime scars would be left on the children and the family unit will be destroyed. If a father is placed on probation, there is no counseling available, there is social stigma, and the assaults continue,

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[58] Harold Sheely, testimony, *Harrisburg Hearing*, p. 123.

[59] New Hampshire Advisory Committee to the U.S. Commission on Civil Rights, *Battered Women and the New Hampshire Justice System* (June 1979), p. 14 (hereafter cited as *New Hampshire Report).*

[60] Susan Fisher, "Family Law Issues of the 1980s: Battered Women," *District Lawyer*, vol. 5, no. 1 (September/October 1980), p. 50 (hereafter cited as *District Lawyer).*

[61] G. Johnson Statement, *Consultation*, pp. 57–58.

[62] Edgar Bayley, testimony, *Harrisburg Hearing*, pp. 95–96.

[63] Connecticut Advisory Committee to the U.S. Commission on Civil Rights, *Battered Women in Hartford, Connecticut* (April 1979), p. 15 (hereafter cited as *Connecticut Report).*

[64] Ibid.

[65] Joanne Rhoads, testimony, *Phoenix Hearing*, p. 13.

[66] Bayley Testimony, *Harrisburg Hearing*, p. 101.

either physical or verbal, and very often result in further violence of a more grievous manner.[67]

Before the Protection From Abuse Act was passed, the criminal justice system was the only recourse for abuse victims in Pennsylvania. Antoinette D'Agostino, a Pennsylvania State trooper and former battered woman, testified that criminal remedies were not effective in stopping the violence in her former marriage:

> This was, as I might remind you, 11 years ago, and I called the police once. The neighbors called the police once or twice. I found the police officers came ready to do a job, which was to haul my husband away, and I found myself in the same position that I found other victims of domestic violence, "Oh, God, what's going to happen when he gets out, because I know he's going to get out." And he did, 8 hours later, and I was almost hospitalized after that beating.
>
> The only reason I wasn't hospitalized was because I was embarrassed to go to the hospital, and they took me to a magistrate. "Yes, but how can I protect myself?" The magistrate was very informative: "You can have him arrested for beating you up."
>
> "Good, then where do I go from here?"
>
> "Well, that's a family problem."
>
> Well, of course, it was, and I wasn't about to carry it home to my own family. They had been listening to it for 3 years. I'm sure they were quite saturated with me and my sad tale of woe, because they had no way to help me. So I found the system worked, definitely, to no corrective measure at all.
>
> You know, it did nothing to help my situation. In fact, at that moment it made it quite worse.[68]

Such experiences have led to speculation that the criminal justice system is inherently unable to solve the problem of spouse abuse. According to Assistant District Attorney Charles Schudson, who helped develop a battered women's project in Milwaukee:

> If one assumes, in the first place, that the criminal justice system is designed to eliminate crime or at least to apprehend and prosecute more serious crime, family violence ranks very low on the list of priorities. After all, family violence has little obvious criminal impact beyond the family unit. It is difficult to see that family violence in this generation can contribute to crime in the next. However, on the other hand, armed robbers tonight can be armed robbers tomorrow. . . .
>
> Apprehension of family violence does not require sophisticated technology that attracts grant proposals from police forces trying to modernize their crime fighting capacities. The D.A.s do not advance their careers by counseling battered women or prosecuting misdemeanor battery cases. Additional attention by the criminal justice system to family violence could add strength to other professions such as social work at the expense of resource allocation to police, prosecutors, and prison.[69]

When the abuser in a domestic violence incident is convicted, the judge's consideration of the relationship between the parties often results in a sentence less severe than the offense would warrant. In Pennsylvania, Judge John Dowling testified that incarceration usually is not imposed for first offenses in domestic violence cases unless the injury is serious:

> [S]imple assault could be up to 2 years. It would depend on the degree of harm caused, whether he has a prior record, how the victim feels about all those factors. If it is a simple assault where there is no serious injury and it is a first offense, you would not normally impose a jail sentence, but you can. . . .
>
> A lot would depend on whether they are now back together or are they getting a divorce. What's the family situation? How does the wife feel about it? It doesn't do much good to put the breadwinner in jail, necessarily. I can't generalize any more than that.[70]

Although judges may view an abuser with no prior record as a first offender who merits leniency, the absence of prior convictions rarely indicates an absence of prior abusive conduct. As Phoenix legal aid attorney Leslie Nixon testified, "One thing that we have found is that the woman we are seeing is probably only the tip of the iceberg, because a woman has to get to a point where she is willing to sort of risk the limelight, let her neighbors, her family, and society know that she is in this predicament."[71] Family violence researcher Barbara Star has noted, "A major difference between family violence and violence committed by a stranger is that violent episodes among family members tend to occur many times, not just one time. And, once begun, abusive incidents often increase in frequency and severity over time."[72] Given the repetitive nature of wife beating and the justice system's indifferent response towards it, an abusive husband who is being convicted for the first time will very likely have engaged in the conduct many times in the past.

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[67] *New Hampshire Report*, pp. 17–18.

[68] Antoinette D'Agostino, testimony, *Harrisburg Hearing*, p. 221.

[69] Charles Schudson, statement, *Consultation*, pp. 80–81.

[70] Dowling Testimony, *Harrisburg Hearing*, p. 71.

[71] Leslie Nixon, testimony, *Phoenix Hearing*, p. 232.

The Connecticut Advisory Committee heard testimony from two judges that if a battered woman's injury was "serious," the abuser would be incarcerated.[73] The Advisory Committee found, however, that very few defendants received jail sentences in the abuse cases they reviewed.[74]

Instead of jailing convicted wife beaters, judges tend to impose probation, suspended sentences, or deferred judgments. In Seattle, for example, there were 98 successful prosecutions during the third quarter of 1979, but very few abusers went to jail:

> Of these defendants, 16 (16%) were sentenced to jail time. There were 47 (48%) suspended sentences, over 47 (48%) deferred sentences. When a defendant is given a suspended sentence it is based on one or more conditions set by the court. If he chooses to obey the court he need never serve the time in jail. In a large number of cases the defendant was ordered to counseling. In 17% of the cases, alcohol counseling was ordered, in 6% batterers counseling was ordered, and in 26% of cases some other counseling was ordered.[75]

In Connecticut, judges told the Advisory Committee that "alternative sentencing [was] used to some degree, commonly probation with conditions such as attendence at an alcoholism or psychiatric counseling program."[76] A similar result is likely in spouse abuse cases in Philadelphia, according to Assistant District Attorney Jane Greenspan:

> [B]y and large, you get a probationary term, and that's either through a negotiated guilty plea or at trial and guilty verdict. By far, the majority is a probationary term. We. . .have had some fines, some suspended sentences, some imprisonments. What we typically try and do is work out a probationary term that involves counseling or treatment. . . .[77]

In Phoenix, when asked what the usual sentence was for a person convicted of misdemeanor assault in a domestic violence case, Judge Alan Hammond said that he did not believe there was such a thing as a usual sentence, but that probation was common in such cases.[78] Judge Hammond advocates the use of long terms of probation, which he believes to be more effective than short terms of incarceration.[79] However, he testified that the Phoenix Municipal Court had only five probation officers, each of whom had approximately 1,000 cases.[80] He expressed concern about the effectiveness of probation:

> The thing that's bothering me now is whether or not we can adequately treat anyone who's placed on probation because of the large caseloads confronting the probation department. . . .If we have the present capability with caseloads of 900 to 1,100 probationers, I think you can envision for yourself how ineffective the individual probation officer might be in treating that many probationers.
>
> VICE CHAIRMAN HORN. . . .[T]hat's 9 minutes per probationer per month per officer, assuming he does nothing else.
>
> JUDGE HAMMOND. That's about it.[81]

An analysis by the Commission of the dispositions in domestic assault cases in Phoenix showed a similar sentencing pattern. Incarceration was ordered in only 8 of 90 incidents of spouse abuse recorded by police during April 1979. Nine of the 90 cases resulted in probation terms ranging from 6 months to 5 years, the most typical term being 12 months. The average fine imposed was $164.[82]

Since, as a general rule, only the most severe cases of spouse abuse ever reach the courtroom, such dispositions tend not to be commensurate with the seriousness of the crimes committed. The Connecticut Advisory Committee reviewed police files in Hartford for the month of March 1977 and found "very little correlation between the facts of the case, the criminal charge, and the actual sentence received" in cases of spouse abuse:

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[72] Barbara Star, "The Impact of Violence on Families," scheduled for publication in *Conciliation Courts Review*, vol. 19, no. 2 (December 1981), p. 11.

[73] *Connecticut Report*, p. 14.

[74] Ibid.

[75] City of Seattle, Law Department, "Battered Women's Project Statistics: 7-1-1979 to 9-30-1979," p. 6.

[76] *Connecticut Report*, p. 14.

[77] Jane Greenspan, testimony, *Harrisburg Hearing*, p. 256.

[78] Hammond Testimony, *Phoenix Hearing*, p. 118.

[79] Ibid., p. 137.

[80] Ibid., p. 118.

[81] Ibid., p. 119.

[82] In January and February 1980, Commission staff, under terms of a user agreement, reviewed all crime reports by Phoenix police officers for the month of April 1979 and reviewed case files in the city and county prosecutors' offices to determine case dispositions. Commission staff devised the forms and tabulated and analyzed the data.

> The three jail sentences were for third degree assault convictions—misdemeanor charges. (In two cases, men went to jail for hitting women. . . .) However, sentences were suspended for a number of apparently more serious felony charges, and in other cases, felony charges were either nolled or dismissed. These cases frequently involved the use of a deadly weapon. . . .A man charged with first-degree kidnapping received a $240 fine and 9 months suspended sentence after he forced the woman into his car, drove her around, and threatened to kill her and her children. A 6-month sentence was suspended for another man who was arrested for cutting a woman with a broken bottle and picking up a shotgun when she tried to defend herself with a knife. The police report indicated that the previous day he had tried to run over her with his car.[83]

In Phoenix, shelter director Patricia Magrath testified that she had only one experience with an abuse case that actually reached sentencing: "She was bruised on every part of her body. I have never seen a woman so badly beat up in my life. . . .He was given 6 months in jail for what he did."[84]

The Colorado Advisory Committee to the U.S. Commission on Civil Rights also found that dispositions in spouse abuse cases did not reflect the seriousness of the offenses:

> Women throughout the Nation complain that when and if assault charges against their husbands or lovers reach the courtroom, judges usually treat the accused with casualness and/or leniency. In order to attempt to assess the situation in Denver, RMRO [Rocky Mountain Regional Office of the U.S. Commission on Civil Rights] staff reviewed the court records of 20 cases involving male defendants charged with violating the city's assault ordinance. The cases were selected because they involved the most severe injuries. Some cases involved injuries such as lacerations to the [victim's] face, injury to the brain, an attempt to break the victim's legs, strangulation, beating of a pregnant victim about the stomach, and destruction of the tissues or organs (eyes, ears, and limbs). The review showed that the most common sentence given to men charged with these violations was a $25 fine. . . .
>
> [Most of the] judges did not treat cases with any marked degree of severity. For example, in one case, a judge did not fine the defendant even though the victim was present and had severe lacerations on her face. In another case, a defendant was given 10 days in jail for a battering incident that resulted in the woman's requiring 18 stitches. . . .
>
> Although the maximum penalty for assault violations is a $300 fine and 90 days in jail, a review of the disposition of court cases for 6 months reveals that this maximum penalty had never been used by any of the judges.[85]

Marjory Fields, supervisor of the family law unit of Brooklyn Legal Services Corporation, cited a study of nine abuse cases tried in Seattle in which none of the assaults, including stabbings and broken bones, was tried as a felony. Instead, the defendants pleaded guilty to charges of "causing a disturbance" and received fines of up to $50 and suspended 1-month sentences. The seriousness of the actual offenses had no effect on the sentence, and none of the abusers went to jail,[86] Ms. Fields said. She also noted that criminal court judges in New York were reluctant to incarcerate abusers. In one case, "a man who had cut his wife above the eye with a piece of broken glass" was given "an unprecedented sentence of unsupervised 'probation'."[87]

In Arizona, Tucson Prosecutor Stephen Neeley testified that over the years he had observed judges' reactions to domestic assaults and had found the sentences lenient:

> I think both the prosecutors and the courts tended to take the matters more seriously when the assault caused the emotional breach and the victim was prepared to follow the thing through to the end, but I think generally the sentences were lenient [and] that the perception of this kind of matter in the courts is probably not as serious as it should be.[88]

Mr. Neeley also noted, "The implication that there is or may be a double standard in the area of domestic violence is probably correct."[89] Several judges interviewed by the Connecticut Advisory Committee said that they "treated assault in the home differently from assault in the street."[90] One judge testified, however, that he believed the position of wives and girlfriends should be upgraded. He said that domestic assault had been "minimized sometimes, and I think those women should be accorded the same rights that a strange woman gets when she is struck out in the streets."[91]

By failing to enforce the laws against spouse abuse with meaningful sanctions, judges weaken the deterrent effect that criminal penalties are meant to embody. When shelter directors in Phoenix were asked if they thought that the penalties imposed by the legal system have been adequate to deter further violence against their clients, they responded as follows:

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[83] *Connecticut Report*, p. 12.

[84] Patricia Magrath, testimony, *Phoenix Hearing*, pp. 13–14.

[85] Colorado Advisory Committee to the U.S. Commission on Civil Rights, *The Silent Victims: Denver's Battered Women* (August 1977), p. 15 (hereafter cited as *Colorado Report)*.

[86] Fields Statement, *Consultation*, p. 257.

[87] Ibid., p. 259.

[88] Neeley Testimony, *Phoenix Hearing*, p. 213.

[89] Ibid., p. 219.

[90] *Connecticut Report*, p. 26.

[91] Ibid., p. 14.

> **Ms. Lyon.** I don't believe it has. I think there are a number of reasons for it. First of all, there is usually probation or 6 months in jail.
>
> **Ms. Rhoads.** Or plea bargaining.
>
> **Ms. Lyon.** Or plea bargaining, or one kind of way out or another.
>
> **Commissioner Saltzman.** In keeping with more severe penalties, do you think—
>
> **Ms. Magrath.** I don't think it's ever really been tried to see what would happen with it. . . .[92]

In Arizona a witness testified that recidivism rates were high in domestic assault cases.[93] Raymond Parnas, a law professor who studied the role of criminal courts in domestic abuse cases, found that the process failed "to serve even loosely defined 'correctional' functions" and accomplished "little in the reduction of recidivism."[94] A study of the New York City criminal court system also noted that recidivism is a problem exacerbated by the court's failure to penalize abusers:

> . . .53% of the women reported that their spouses bothered them again within a few months following the disposition of the court cases. . . .Both a perception on the part of the defendant that the court was not serious and a failure on the part of the court to follow up with stronger measures in certain cases appeared to be related to continuing harassment by the defendant. According to one woman, "It [taking the case to court] made it worse. After he didn't get locked up the first time he realized they'd never lock him up. The first time he went to court he was scared. After that, when I threatened to call the police, he'd laugh and beat me up." Another woman said, "They told him if he did it again he would go to jail. When we came back again they acted like they had no record of it."[95]

Testimony suggests that judges treat repeat offenses only scarely more seriously than first offenses. In Pennsylvania, for instance, District Justice Joseph Pinamonti testified as follows:

> The first offense, usually, the way I handle it, the defendant has the opportunity to plead one way or the other, either not guilty or guilty. If he pleads guilty, usually, the first offense, I will impose a $25 fine and the cost of the complaint, which is a total of $51.
>
> More severe, the second or third offense. At that point even if they want to plead guilty, I want to hear what happened. I get into a hearing and, at that point, then I will impose a fine and perhaps jail time. A lot of times, what I'll do, I'll fine the defendant $100 if I find him guilty and impose a 30-day jail sentence, which I defer pending good behavior on behalf of this defendant. If in fact he should go back in the house and either fight with his wife or his girlfriend, bring him back for the third instance, at that point I would have him picked up and incarcerated in the Dauphin County jail.[96]

If a woman drops the charges against her abuser, the judge may treat her case less seriously when she comes back to court again after another incident. Despite the fact that such cases are, in a sense, repeat offenses, the court sometimes acts as though the woman has "cried wolf" and no longer deserves protection. For instance, District Justice Paul Hardy testified that he became "a little skeptical" of complaints brought by women who repeatedly drop charges.[97] In Phoenix, Justice of the Peace Ronald Johnson reported that if a woman drops charges against her abuser in his court, he will not accept another complaint from her for 6 months.[98] A Manchester police sergeant told this Commission's New Hampshire Advisory Committee that after several episodes of dropped charges, the judge may respond as follows:

> [T]he court will come out and make a statement like, addressing the police officer, "If she comes in and makes a complaint to you about her husband anymore, I don't want you to take it." It's more or less giving a license to the guy to go ahead and just about kill her.[99]

Thus, the courts are quick to punish a victim who has dropped charges in the past, even though her decision may have been prompted by the criminal justice system's lack of encouragement or by circumstances beyond her control, such as financial dependence on her abusive husband.

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[92] Rhoads, Ellen Lyon, and Magrath Testimony, *Phoenix Hearing*, p. 30.

[93] For example, Greenspan Testimony, *Harrisburg Hearing*, p. 258; Hammond Testimony, *Phoenix Hearing*, p. 137.

[94] Raymond I. Parnas, "Prosecutorial and Judicial Handling of Family Violence," *Criminal Law Bulletin*, vol. 9 (1973), p. 747.

[95] Elizabeth Connick, Jan Chytilo, and Andresa Person, "Battered Women and the New York City Criminal Justice System" (paper delivered at the 1980 Annual Meeting of the Law and Society Association and the Institute for Social Analysis Research Committee on Sociology of Law, Madison, Wis., June 5–8, 1980), p. 12.

[96] Pinamonti Testimony, *Harrisburg Hearing*, p. 74.

[97] Hardy Testimony, *Harrisburg Hearing*, p. 73.

[98] R. Johnson Interview.

[99] *New Hampshire Report*, pp. 16–17.

In Phoenix, shelter director Patricia Magrath testified to the steps some judges take to avoid punishing repeat offenders:

> [W]e had a client who was. . .assaulted and robbed and kicked in the head and had her hand broken and all this stuff. Her assailant was let out. . .on his "own recognizance"—even though he had prior assault charges. She was put in jail for protective custody.[100]

Marjory Fields reported that at least one woman took a drastic step when the court failed to punish her abuser after repeated assaults:

> A classic example was the case in New York City in which a woman brought charges against her former common-law husband for beating her savagely on five different occasions within a year and a half. Although she had been beaten so severely that she had been hospitalized on at least two occasions, had lost an eye and part of an ear, her assailant was released each time on his promise to the judge that he would not repeat the offense. The victim, I am told, finally solved the situation herself. She committed suicide.[101]

Civil Court Remedies

Although a divorce may be a solution for a battered woman who wishes to sever all connections with her abuser, it does not end the abuse in every case. Some men, unable to make the emotional break a divorce necessitates, continue to pursue their victims. Some women, unable to sustain themselves financially after a divorce, are forced repeatedly to seek court orders for alimony, medical expenses, child support, and social security benefits, thereby exacerbating an already tense and adversarial relationship. If the couple has children, there may be opportunities for renewed abuse because of visitation rights. The divorce process itself can trigger violence.

Many victims want to end the violence without terminating the relationship. In such cases, protection orders may be more appropriate:

> Civil injunctions provide the wife who does not wish to have her husband prosecuted on criminal charges or to seek a divorce with an alternative remedy that may give her protection. A court order directing the offender not to strike, menace, harass, or recklessly endanger his wife will in most cases be sufficient to stop the attacks.
>
> Much of the effectiveness of such orders will depend upon the general public's knowledge that they are enforced by sentences for contempt. If the offensive conduct does not cease, or is resumed after a hiatus, then the victim may realize the need for the more drastic legal remedies of criminal prosecution or divorce. Thus, the injunctive remedy can be useful even when it is not successful in ending the violence.[102]

Asked to evaluate the effectiveness of the remedies available in Pennsylvania to battered women wanting to end abuse but maintain their relationships, Harrisburg legal services attorney Nancy Rourke testified as follows:

> That's the hardest kind of a case to resolve, to get what she wants, because it involves a change in attitude by somebody who is out of her control, and that's him. She has no way to force him to change. . . .[S]he can force him to stay away from her, she can force him to stay out of the house, and she can send him to jail if he won't, but she can't force him to change his behavior.
>
> The Protection From Abuse Act is a whole lot more effective than anything I've seen coming out of the criminal justice system in achieving the end result of trying to save the marriage, but it's not all by itself going to resolve that problem.[103]

Other witnesses said the chief advantage of protection orders was that they provided much more immediate relief than did criminal remedies. Judge Harold Sheely, for example, testified that the Protection From Abuse Act had been a useful addition to the tools he had for protecting victims of domestic violence:

> I think what helps, if you can get a person into court quickly, a lot of times the mere appearance before a judge and telling them, "If you violate this, you're going to jail," I think that has a salutary effect. We do see them faster in that type of a case than we do in a normal criminal case that is filed. It might take 3 or 4 months before that would get to us.[104]

Sgt. Peter Brooks, of the Harrisburg Police Department, agreed with this view:

> The advantage of the Protection From Abuse Act—in my opinion a great piece of legislation—is that it stops the violence now, immediately. It's not like a criminal complaint where someone can wait, hang on edge for 180 days for a case to come to court.[105]

Legal services attorney Lawrence Norton testified that the Protection From Abuse Act provided more than just a quick response to the problem:

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[100] Magrath Testimony, *Phoenix Hearing*, p. 33.

[101] Fields Statement, *Consultation*, pp. 213–14.

[102] Ibid., p. 270.

[103] Rourke Testimony, *Harrisburg Hearing*, p. 167.

[104] Sheely Testimony, *Harrisburg Hearing*, p. 123.

[105] Brooks Testimony, *Harrisburg Hearing*, p. 39.

> [I]t is a question of expeditious action, yes, but there are many other elements to it I think, that make the Protection From Abuse Act and the civil remedy more desirable, if there were choices to be made, than the criminal system.
>
> Yes, the act requires a hearing to be held within 10 days. That's important, very important. It also makes it clear that a hearing is going to be before a judge, that we are not going through these initial stages where we deal with district justices, which in Pennsylvania means nonattorneys, and it means in our counties, the counties that we serve, and I think it is true all across most of Pennsylvania, a very unsophisticated and conservative approach to any new kinds of issues and new legislation and barriers to enforcement of the act. So we know, by using the Protection From Abuse Act, we're going to get to a judge, and it is going to be treated seriously in court.
>
> In addition, I think the people's reaction to the civil process as opposed to the criminal process is different. In either case, we're talking about the judicial system getting involved in some family life of some kind, and that's a difficult step for anybody, but I think it is much easier for people to know that the remedy that they are going to pursue is not only more flexible and broader relief can be given, but that it is civil in nature; it's not criminal in nature, just by the terminology used; and that the result, if successful, is not necessarily going to be putting somebody in jail.
>
> It is not necessarily going to be depriving the woman and the children of support that the woman and children may need, if successful. If unsuccessful, it is not affected at all. I think there are many aspects to the Protection From Abuse Act that make it far preferable to using the criminal process as an alternative.[106]

In most States, protection orders are available only during the pendency of a matrimonial action.[107] In Arizona, for example, a protective order is issued automatically when a petition for legal separation or dissolution of marriage is filed.[108] This automatic protective injunction, of course is not available to battered women who are not married to their abusers.

In Pennsylvania, the Protection From Abuse Act is not limited to married victims, and it may be used whether or not an action for divorce or legal separation is pending.[109] The act does not apply, however, to people who formerly lived together unless both parties retain legal access to the residence. This has caused problems for some battered women, according to a shelter employee:

> [W]e're experiencing a gap in the act. . . .[A] judge won't grant an order if the parties are living apart. . . .[I]f she's moved out but he still is harassing her and abusing her, she can't use the Protection From Abuse Act, and she has to seek other remedies, some of which are criminal, and I've already spoken to the fact that criminal procedures don't work very well in Lancaster County for domestic issues.[110]

Another factor that may limit the accessibility of protection orders for battered women is the cost. James Keenan, director of Community Legal Services in Phoenix, has noted:

> [O]ne of the realities is that if you don't have access to the system, whatever remedies the system might have are really meaningless, and for many of the low income, irrespective of the type of legal problem they are attempting to pursue, access to the system at the initial level becomes the issue. And unless that is solved, the system's remedies are not going to be meaningful.[111]

Lois Kermott, director of the Community Legal Services family law program in Phoenix, testified about the barriers erected by incidental charges associated with obtaining and enforcing protective orders:

> [U]nder the rules of civil procedure a petition for a contempt has to be served personally on the respondent, and this is a charge which our clients have to pay, which is the service of process, and it amounts to $25 to $30 and our client is usually not working at the time and, if her spouse is beating her, he usually is not financially supporting her.
>
> In addition, she also has to start her divorce proceedings [in order to have the automatic injunction issued]. She also needs certain sums of money, which are $40 for the filing fee and another $25 to $30 for service of process, and there is a possibility in the Maricopa County courts to get the filing fee waived or deferred, but that also takes time.[112]

Despite the fact that statutes in many States provide for protection orders in abuse cases, many judges are reluctant to issue them. In Pennsylvania, for example, some judges have exhibited hostility to the Protection From Abuse Act. Legal services attorney Lawrence Norton testified about his experiences with the act in Cumberland County:

> Initially, we had problems with the judges even accepting petitions. We not only could fail to, in some instances, get an order we would ask for; initially we got petitions back in our office, judges refusing to have them filed, not saying

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[106] Norton Testimony, *Harrisburg Hearing*, p. 156.

[107] Fields Statement, *Consultation*, p. 268.

[108] Ariz. Rev. Stat. §25-315 (A)(1)(b) (Supp. 1979).

[109] 35 Pa. Stat. Ann. §10181 (Purdon 1978).

[110] Farber Testimony, *Harrisburg Hearing*, p. 30.

[111] James Keenan, testimony, *Phoenix Hearing*, p. 165.

[112] Lois Kermott, testimony, *Phoenix Hearing*, p. 165.

> they weren't going to have them filed but sending them back and asking questions and making objections to the petition. . . .
>
> The express reason for refusing to accept them was the statement and policy directive and interpretation by the courts in our county that it wasn't needed; there were other ways of enforcing the rights that were attempted to be enforced by the petition, and that those ways were more desirable than enforcing the Protection From Abuse Act. . . .
>
> After we stopped having problems with having the petitions filed in Cumberland County, there was a period of time when we had some problems with having hearings set within the statutory period. Usually, it wouldn't go beyond a day or two after, but the courts were not setting hearings immediately under the express provisions of the act.
>
> I think—it is clear to me that one of the reasons for that is the courts resented the legislature in effect setting out a statute that required them to give court time to these matters, and that was one of the ways—all of these things are some of the ways the courts responded to that.
>
> Right now we're not having problems with the dates being set within the confines of the statute. We are having some problems with interpretation of the statute, and we are having continuing problems with enforcement and instructions and guidance that the courts are giving within the county on enforcement.[113]

In New Hampshire, a domestic violence task force surveyed judicial and police attitudes and found some judges to be "openly hostile" to that State's law providing protective orders for battered women.[114] The director of the State's only shelter for battered women said the Protection of Persons From Domestic Violence law[115] was "ineffective in a significant number of cases because of hostility or misunderstanding on the part of those who must enforce it."[116] The shelter filed a formal complaint against one judge because he refused to grant a restraining order and was reluctant to issue orders for shelter residents.[117]

Some New Hampshire judges hesitate to issue protective orders when the victim "seeks an order well after an attack has occurred but from a fear that another beating is imminent."[118]

Marjory Fields, writing about a New York family court, reported a related problem:

> Judges avoid making decisions by issuing "mutual orders of protection," ordering each party not to harm the other. This has the negative effects of holding the woman equally guilty for the beating she suffered and relieving the wife beater of responsibility for his violence. Allegations of battering are viewed as shams used by wives to gain a weapon to achieve control over their husbands.
>
> Some judges are reluctant to grant any relief. A woman who had been beaten frequently during 18 years of marriage sought an order of protection in Brooklyn Family Court. She decided that she needed help because the beatings were getting more severe and more frequent. The judge told her that he was not granting her an order of protection, even though the beatings were not denied but only minimized by her husband. The judge ordered both parties to go for counselling. The woman protested that she had tried counselling, but it did not work. The judge was adamant. The husband felt vindicated. The woman sued for divorce because she believed she could be safe only if she no longer lived with her husband.
>
> This woman said she felt that the judge was more critical of her failure to take action against her husband before this court proceeding than of her husband's violence. The judge's attitude was, "If you never tried to get help before, then I will not try to help you now." Her years of sacrifice and suffering to keep her family together were being turned against her. She was treated as the culpable party for fulfilling the role of patient wife and dutiful mother.[119]

Even in those jurisdictions where protection orders are readily available, some judges are reluctant to use creative provisions that are allowed, but not specified, by the law. In the District of Columbia, for example, proposed revisions to the Intrafamily Offense Act[120] would expand the language specifying additional types of relief because "judges freqently have been reluctant to order relief not authorized expressly."[121] In Pennsylvania, legal services attorney Nancy Rourke testified that although the legislature intended the Protection From Abuse Act to allow the court to order counseling or alcohol treatment, the judges in Dauphin County would only issue such orders based on an agreement worked out by the parties or where a previous order had been violated. Moreover, an abuser's agreement to attend counseling was not enforced with a finding of contempt if he failed to attend.[122] Edwin Frownfelter, a legal services attorney in Cumberland County, testified that there was "definitely an attitude in our circuit that the Protection From Abuse Act will be enforced to the extent that it is mandated and no more, and apparently maybe not even to that extent."[123]

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[113] Norton Testimony, *Harrisburg Hearing*, pp. 151–52.

[114] New Hampshire Advisory Committee to the U.S. Commission on Civil Rights, "Domestic Violence Reform: One Year Later," August 1980, p. 6 (hereafter cited as *New Hampshire Statement*).

[115] N.H. Rev. Stat. Ann. §173–B.

[116] "New Domestic Violence Law Working, But Not Too Well," *Manchester Union Leader*, Aug. 22, 1980.

[117] Ibid.; *New Hampshire Statement*, p. 6.

[118] *New Hampshire Statement*, p. 7.

[119] Fields Statement, *Consultation*, pp. 258–59.

[120] 16 D.C. Code, Ch. 10, §16–1001 *et seq.;* P.L. 91–358, 131(a) (July 29, 1970).

[121] *District Lawyer*, p. 52.

At the center of the controversy over whether or not protection orders should be provided for battered women is the reluctance of many judges to issue such an order on a temporary, *ex parte* basis. On this basis a man could be excluded from a residence to which he would otherwise have legal access and would not have an opportunity to be heard until after the order had been issued. In Arizona, Judge Irwin Cantor described the procedure by which protective orders were issued in his court and testified on some of his concerns about the propriety of excluding abusers from their homes:

> We feel that a threat is not enough. There has to be an actual assault before I exclude, and the reason is [because] of the Constitution that all property here is community property with the exception of gift proviso; I won't get into those, but if the property is community property, each has a right to live there.
>
> And so if you're going to take away a constitutional right of property. . . or the use of the property, which is an inherent part of the right of property, there has to be something, for lack of a better designation, amounting to a criminal act before you're going to deprive one person from the use of the property.[124]

In Pennsylvania, objections to the Protection From Abuse Act generally center on due process considerations. Many judges criticize the act because it allows alleged abusers to be excluded from their homes temporarily without a hearing. Some judges also complain that the section of the act providing that an abuser who violates a protective order can be jailed without an opportunity to post bail is constitutionally suspect. President Judge Dale Shughart testified that he seldom if ever granted *ex parte* protection orders and described his reservations about the Protection From Abuse Act:

> JUDGE SHUGART. It seems to me that where the circumstances are so severe as to justify an *ex parte* order, which, in my opinion, might be questionable as to due process, then the use of the criminal proceedings is the one that should be utilized, because, if a warrant were issued and the defendant was picked up, he has full rights to an arraignment, he has a right to have bail fixed, and he has other rights. For any individual, as a judge, to issue an order based on somebody's affidavit excluding that individual from his home, this is a very, very drastic situation because I think the individual excluded from the home also has constitutional rights that have to be protected, so that I am not favorable to granting exclusionary orders except under very drastic circumstances, and I don't know that I've ever signed one. . . .[125]
>
> COUNSEL. Do you feel that there are the same due process questions or constitutionality questions that you referred to, do you feel that type of question is presented where an *ex parte* order is sought directing the husband not to abuse the wife further, where the question is not one, in other words, of excluding the husband from the home but directing him to take other actions with respect to refraining from harassing or abusing the wife?
>
> JUDGE SHUGHART. . . .I see nothing wrong with telling a man he isn't supposed to beat his wife.[126]

When Judge Harold Sheely was asked whether he had the power to enter preliminary injunctions or temporary restraining orders on an *ex parte* basis in ordinary civil cases where he was satisfied that the requirements had been met, including the likelihood that irreparable injury would result without the order and that there was a probability of success on the merits, he responded: "[W]here you can satisfy the court that there is immediate and irreparable injury. Yes, we can sign a preliminary injunction *ex parte* based on affidavits."[127]

Judge Shughart testified that his main concern was that "the individual whose rights were going to be affected by the order certainly has a right to be confronted by his witnesses."[128] He testified that once that is done, he would not be reluctant to issue an order: "I have no hesitancy in imposing an order of any type after I hear the testimony."[129] When asked, however, if he had any problems with excluding the husband from the home after a contested hearing had been held or if he believed that constitutional questions arose only in an *ex parte* situation, Judge Shugart responded: "You're asking me for a legal opinion on something that I may have to pass upon sometime and I won't attempt to answer that. I don't know."[130]

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[122] Rourke Testimony, *Harrisburg Hearing*, p. 161.

[123] Frownfelter Testimony, *Harrisburg Hearing*, p. 208.

[124] Cantor Testimony, *Phoenix Hearing*, p. 120.

[125] Shughart Testimony, *Harrisburg Hearing*, p. 106.

[126] Ibid., p. 107.

[127] Sheely Testimony, *Harrisburg Hearing*, p. 126.

[128] Shughart Testimony, *Harrisburg Hearing*, p. 125.

[129] Ibid.

Judge John Dowling also testified that he thought the Protection From Abuse Act was "constitutionally suspect":

> [O]n mere petition you can exclude a spouse from the home, put him right out. He doesn't have a chance to tell his side of the story. It may be a totally different picture when you get into court. . . .
>
> Normally, in court, when you come in with a petition for an *ex parte* injunction, you must put up a large bond. You must have a very, very extraordinary case to get it *ex parte.*[131]

Although he voiced doubts about the Protection From Abuse Act, Judge Dowling testified that he issued orders under it:

> Well, a law is presumed to be constitutional. I can't disregard the law. . . .
>
> I have my own feelings about a lot of the laws. I may not like them. I may be concerned, but my first duty is to carry out the law, and until an appellate court says an act is unconstitutional, it is constitutional.[132]

Michael Irey, a special master appointed by the president judge in Columbia County, Pennsylvania, to issue protection orders under the Protection From Abuse Act, also testified that his reservations about the constitutionality of *ex parte* protection orders did not prevent him from issuing them:

> I have some reservations with regard to. . .denial of due process; however, my rationale for executing temporary orders is the fact that the hearing is scheduled within a relatively short period of time, and on that basis I will sign the temporary order if the allegations in the petition support that type of relief.[133]

Legal services attorney Nancy Rourke testified that she did not find the *ex parte* provision constitutionally troublesome because the full hearing is held quickly. She also said that the abuser's property rights are limited:

> [Y]ou don't have the right to use your own property to assault someone else or physically hurt someone else. That is a standard legal principle. A neighbor can't use his property to harass or bother a neighbor. . . .
>
> The State has the power to put restrictions on people's use of their property. The State has the right to provide protection for another person who has a legal right to be in that property. I don't have a question with the constitutionality of it.[134]

Barbara Hart, a legal services attorney and legislative chairperson for the Pennsylvania Coalition Against Domestic Violence, testified that she was aware of criticism that the Protection From Abuse Act was unconstitutional:

> Many judges have said to me, "I do not intend to enforce this because it is unconstitutional," and I said, "Your Honor, it's the law," and they say that they believe it is unconstitutional and do not.
>
> One president judge in a rural county has informed his bench that they are not to accept any filings because he believes it is unconstitutional, but it has not been declared so.[135]

Ms. Hart defended the constitutionality of the act:

> I would suggest to this distinguished panel that it is not an unconstitutional act. . . .Due process simply requires notice and opportunity to be heard.
>
> This act provides both. . . .
>
> [W]hat this act is saying is: "If you abuse your spouse, you have the right to notice; you have the right to a hearing, but if it is found that you have abused your spouse, you will lose, for a temporary moment, the right to live in your home."
>
> We are always balancing two rights: We are balancing the right of someone to abuse and the right of someone to live free from fear of constant harassment and physical violence—and I do not think we will ever find this act to be unconstitutional.[136]

Several witnesses testified that the issue was not whether the act was constitutional, but how judges' perceptions of the act affected the way they enforced the law. For example, attorney Lynn Gold-Bikin, chairperson of the Domestic Violence Committee for the Pennsylvania Bar Association, testified that she saw the constitutional questions raised by many judges as an excuse for not doing something they did not want to do:

> [M]any times when they say "I don't think this act is constitutional; I'm not going to enforce it," that's their excuse for not enforcing it but not the reason they are not

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[130] Ibid., p. 109.

[131] Dowling Testimony, *Harrisburg Hearing*, pp. 69–70.

[132] Ibid., p. 83.

[133] Michael Irey, testimony, *Harrisburg Hearing*, p. 138.

[134] Rourke Testimony, *Harrisburg Hearing*, p. 157.

[135] Barbara Hart, testimony, *Harrisburg Hearing*, pp. 10–11.

[136] Ibid., p. 12.

enforcing it. They are not enforcing it because they don't believe men should be out of their homes for abusing their wives because it goes on in every family, and I have been told that by more judges than I care to tell you.[137]

Legal services attorney Lawrence Norton, who did not think the act would be found unconstitutional, also questioned some judges' motives:

[If] a judge. . .thinks that a certain provision is unconstitutional, it seems to me the judge should declare it unconstitutional, enter an order, and issue an opinion that it is unconstitutional for the purpose of having that decided by the appellate bodies that are going to have to decide it.

The judges that have expressed their concerns about the constitutionality of provisions of the statute to us have not done that, and they, I think, have used it as another barrier to the enforcement of the act.[138]

Asked whether by refraining from ruling the act unconstitutional he was blocking the right of appeal by women who were denied protective orders in his court, Judge Shughart responded as follows:

Judge Shughart. As long as we make our decision, depriving them of what you say their right is under the statute, they immediately have a right of appeal.

Commissioner-Designate Ruckelshaus. Well, no. . . .That's not the issue they come to you on. They come to you asking for a protective order. Well, that isn't available in your court, evidently.

Judge Shughart. We didn't say that it wasn't available. I think we said it was not available as a general proposition, and I think—I'm really surprised to hear some of the things that I've heard here today that it is perfectly all right in behalf of somebody's "right to be free from abuse" to go out and violate somebody else's right to be heard.[139]

This discussion raises the question of what a judge's responsibility is when he or she believes a statute is unconstitutional. Some judges appear to take the view that they may ignore any act they find constitutionally suspect:

Commissioner-Designate Berry. As I understand it, in the Commonwealth of Pennsylvania when the legislature passes a statute—and I'm quoting from what you said, Judge Shughart—that a court should not have any part in dealing with an act that it thinks is unconstitutional. Is that correct? Am I misinterpreting what you said?

Judge Shughart. No, you're not misinterpreting what I said.

Commissioner-Designate Berry. So that that's your position you take on any statute, or is it just on this Protection From Abuse Act?

Judge Shughart. There are many, many instances of that that could be given. I don't feel that I want to comment on what they are. . . .[140]

Commissioner-Designate Berry. I have never heard in the history of my own legal training—and I think other lawyers will agree with me—that a lower court can simply decide that an act is unconstitutional and have nothing to do with it. Not even making a decision, just simply saying, "We won't have anything to do with it in our court."

Judge Shughart. When they relieve me from my oath to uphold the Constitution, then I can blindly, supinely act without thinking about it.

Vice Chairman Horn. May I say to my colleague, I don't disagree on that point, but what I'm saying is, if a judge feels an act is unconstitutional, I do think the judge ought to rule that the act is unconstitutional, rather than just say, "I won't act until I hear from higher authority." Or "I will continue [not] to carry out this law until I hear from higher authority." I think a person has a responsibility under the Constitution to fulfill his conscience, but I do agree on your point that you shouldn't just slide away from the issue. . . .

Judge Shughart. If you don't act on it—if you don't act on the provision, you are making a decison.[141]

In some jurisdictions, it takes a long time to obtain a protection order. Judge Harold Sheely pointed out that a protection order could not begin to work until the abuser had been served with notice of it:

What happens sometimes, of course, you try and set a hearing the next day or very soon. Sometimes you can't get service on the other party. They might no longer be there, and you can't very well require them to be there [in court] until they can be served with your order setting a hearing.[142]

In the District of Columbia a battered woman may wait "from three to 6 weeks or more"[143] for a civil protection order. According to Assistant Corporation Counsel Cary Pollak, the delay is caused, in part, by problems with service of process:

The marshals work from nine to five, Monday through Friday. This makes it difficult to get the in-hand personal service required by the statute because a lot of these defendants aren't working or work in very mobile jobs. If funds were available for a special process server, it would go a long way to solving the time problem.[144]

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[137] Lynn Gold-Bikin, testimony, *Harrisburg Hearing*, p. 17.

[138] Norton Testimony, *Harrisburg Hearing*, p. 158.

[139] Shughart Testimony, *Harrisburg Hearing*, p. 123.

[140] Ibid., p. 121.

[141] Ibid., p. 122.

[142] Sheely Testimony, *Harrisburg Hearing*, p. 126.

[143] *District Lawyer*, p. 51.

In Philadelphia, according to shelter director Peggy McGarry, court backlogs have caused a delay in the issuance of protection orders:

> [T]o get a temporary order under the act, which. . .one should be able to get in 24 hours—at this point there is often a wait of up to a week to get a temporary order, and the hearing for a permanent order, which is supposed to happen, under the act, in 10 days, is often not happening now for as long as 3 weeks because of the backlog there. . . .[145]
>
> Unfortunately, at this point, family court is only able to handle. . .90 petitions a month. . . . [I]n our legal clinic in Philadelphia, we get. . .30 to 50 women a day looking to have such a petition filed for them under the act, many, many, many of whom are eligible under the terms of the act, but there is neither the legal representation nor the ability of the court to handle that kind of volume.[146]

Assistant District Attorney Bebe Holtzman also complained of delays in Philadelphia courts. She testified that enforcement of protection orders was hampered by scheduling problems:

> [T]here have been scheduling problems. Although the judges have complied in terms of hearing the contempts, the numerous problems associated with that have increased. You know, scheduling it at a time when that judge is available in a courtroom that is open, getting the parties subpenaed. . . .[147]

Scheduling is also a problem in the District of Columbia, since "intrafamily motions are heard only on Friday, and when holidays fall on that day, more time can be lost or the calendar must be enlarged the subsequent Friday."[148]

The New Hampshire Advisory Committee heard from participants that court schedules also adversely affect battered women in rural areas:

> Dr. Sheila Stanley noted that part-time courts and lack of access to court services are particular problems in domestic violence cases, in that most incidents occur during evenings and weekends. Moreover, in rural areas, accessibility in distance is as much a problem as accessibility in scheduling.[149]

Gloria Gilman, director of Philadelphia's Domestic Abuse Clinic, testified about the inadequacies of the Protection From Abuse Act in responding to domestic violence that occurred during weekends:

> There are a lot of problems with the court system in that there are emergency weekend orders which include evictions, and they expire at 9 a.m. on Monday morning. At 9 a.m. on Monday morning we have 30 people at our door. . .[E]ven if we could really file protection orders immediately for all those people, because of our staff it takes us a number of days to get the petitions all typed. Then we have to walk them through the system, and it takes days to get a temporary protection order signed, and then it takes a week to 10 days to have a hearing after the temporary protection order is signed. That is not how the act reads. That is really improper procedure.
>
> [W]hat it means is that a woman who had someone evicted over the weekend has to go hide until she gets her temporary protection order signed, which could be 5 days, it could be a week.[150]

According to Marjory Fields, women in New York City are similarly vulnerable:

> There is no session of New York Family Court at night or on weekends. A woman attacked on Friday night must wait until Monday morning to commence a civil proceeding for an order of protection.[151]

Another weakness of the civil route, noted by Ms. Fields, is that victims generally do not have a right to counsel:

> I think right to counsel is imperative in this situation. Women appear before the family courts in New York without representation. The husband has a right to counsel because of the possibility of being held in contempt should he subsequently violate the restraining order not to strike his wife. If the wife is without counsel, there is no prosecutor in these cases. The State is not a party. Women without representation get no relief at all, even though the laws are flexible, humane, and creative. It is not enough to put statutes on the books without making a remedy viable by providing counsel.[152]

Aside from problems with accessibility and scheduling, which could be remedied by changes in State statutes or local court practice, the chief drawback to protection orders is that although they are relatively effective in deterring further violence, they cannot ensure that it will not occur. When asked if he found any difficulties in the use of exclusionary orders as a tool for protecting battered women, Phoenix Judge Irwin Cantor responded:

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[144] Ibid.

[145] Peggy McGarry, testimony, *Harrisburg Hearing*, p. 23.

[146] Ibid., p. 30.

[147] Holtzman Testimony, *Harrisburg Hearing*, p. 255.

[148] *District Lawyer*, p. 51.

[149] *New Hampshire Report*, p. 18.

[150] Gilman Testimony, *Harrisburg Hearing*, p. 233.

[151] Fields Statement, *Consultation*, p. 269.

[152] Ibid., p. 42.

> I think it is practically worthless in those cases where the man is so emotional, so wrought up that he's intent on doing something. He's so frustrated, a piece of paper saying "You should not go near your spouse" is not going to stop him, and. . .just like a broken record I tell the lawyers, "you're better off advising your client to go to a motel or go to a friend, because this piece of paper is not going to stop anyone who is determined to harm your client."[153]

Phoenix attorney Thomas Novak agreed:

> The preliminary injunction that we have is very, very effective, I would say, in the great majority of the cases, in [which] the man who is normally going to get upset and is going to react by possibly some harassment, possibly some abuse.
>
> Okay. If it's a man who has got his mind bent on causing injury. . .no, the court-ordered injunction is not going to stop him. A temporary restraining order, a permanent restraining order, they are all just pieces of paper and a piece of paper is not going to stop a man who is that hell-bent on causing someone some physical injury. But it is going to be a big help in probably the vast majority of the cases.[154]

On balance, most commentators agree that protective orders, as "noncriminal remedies that are often effective in ending wife beating,"[155] should be expanded and simplified. Their usefulness in many jurisdictions, however, is limited by the failure of judges to enforce the orders when they are violated. Phoenix attorney Thomas Novak explained the effect that lack of enforcement has on protective orders:

> A court order is a great thing, but if it's generally known that. . . .a person who violates this court order is not going to be punished, that court order is meaningless. . . .
>
> We need attention to the fact that, as you mentioned, people, because of the fact they are married, that there isn't an exception carved out—that there is no [innate] privilege for a husband to beat a wife.
>
> We have to specifically set out and point out that this is a crime, that if you do it you are going to be punished.[156]

There are at least two ways in which judges can weaken the enforcement of protective orders. First, they may instruct police not to arrest people whom they have probable cause to believe have violated protective orders, but who have left the scene before the officers have arrived. Sgt. Stanley Krammes, a Pennsylvania State Police officer, testified that he had sought guidance from the judge in Perry County, who suggested that the officers should advise the victim to seek enforcement through the district justice in such a situation:

> The judge feels that if the situation—for example, if the husband would be prohibited from going back to the property and he did appear back there and then left prior to the arrival of the police, it is his suggestion that we withhold the service of the order.
>
> I realize the law itself reads that that is not necessary. However, that's his feeling in the matter, that we don't serve the protection order; that the abused party seek the legal system, the district justice.[157]

Another way that judges dilute the effectiveness of protective orders as a remedy for spouse abuse is by failing to enforce them with meaningful sanctions. Marjory Fields cites an example of a judge who finds the husband and wife both in contempt when the wife complains that the restraining order has been violated.[158] She also reported that incarceration is rare when protective orders are violated in New York City:

> In New York Family Court, judges presiding in civil, family offense proceedings for injunctions, called orders of protection, hardly ever impose jail sentences for contempt for violation of prior orders, although the complete case history is always before the court. This is in spite of the option to sentence a man to serve this time at night and on weekends so that he can keep his employment.[159]

Many judges appear to be willing to enforce protective orders by having violators arrested and taken to jail to await contempt hearings. In Pennsylvania, Sgt. Peter Brooks, of the Harrisburg Police Department, testified that the Dauphin County courts were enforcing orders issued under the Protection From Abuse Act:

> [L]ast week I checked the docket and there were three or four violations of indirect criminal contempt because fellows felt that it was okay to violate that court order, and what the judges in Dauphin County are saying is, "No. No, it is not okay." And what the district justices are

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[153] Cantor Testimony, *Phoenix Hearing*, pp. 120–21.

[154] Thomas Novak, testimony, *Phoenix Hearing*, pp. 233–34.

[155] Fields Statement, *Consultation*, p. 268.

[156] Novak Testimony, *Phoenix Hearing*, pp. 238–39.

[157] Stanley Krammes, testimony, *Harrisburg Hearing*, p. 132.

[158] Fields Statement, *Consultation*, p. 268.

[159] Ibid., p. 258.

> saying is, "No, it is not okay to violate that court order." So we are taking these people off the street.[160]

Nonetheless, when the violator appears before a judge in a hearing to determine whether he is in contempt of court, usually no sanction is imposed beyond the time already spent in jail awaiting the hearing. Thus, once again, the judge's message to the defendant, as well as to police officers, prosecutors, and society, is that spouse abuse is not to be taken seriously as a crime against society.

Judge John Dowling described the contempt hearing procedure as follows:

> **JUDGE DOWLING.** I listen to it, and if he did violate it and he's been in jail a week, we usually tell him not to do it again and let him go. You can't keep him in forever. If he says in the rare case, "I don't care what you say; I'm going to go back into the house," then he goes back to jail. Usually, a few days in the lockup—they calm down.
>
> **COUNSEL.** And so you would say that the sanction that is usually imposed in that case would be the time already served? Is that an accurate summary of what you've said?
>
> **JUDGE DOWLING.** Yes. They can do 6 months, but that would be a rare choice.[161]

Bloomsburg, Pennsylvania, Special Master Michael Irey also testified that on the three occasions he had protective orders violated, "there were no sanctions imposed other than the time spent in jail" before the hearing.[162]

In Arizona, legal services attorney Lois Kermott testified that the deterrent value of the protective order is lessened by the contempt process that must be followed if the order is violated:

> I find that the contempt procedures, especially for my clients, are very slow; they are an additional expense, and that judges rarely punish by jail sentence or a fine a person found guilty of contempt. . . .[163]
>
> [I]n the cases that I've handled, the judge has usually found the respondent in contempt, but he can purge himself of that contempt by not doing it anymore; so that is a result of the contempt hearing: "Okay, you did a bad act but don't do it anymore."[164]

Attorney Thomas Novak agreed that the contempt process was not conducive to enforcement because the courts held many contempt hearings for a variety of activities and, therefore, did not take them seriously enough:

> [I]f someone would say that they were going to take me into court for contempt of court, that would sound like a pretty serious thing.
>
> The only problem is that, historically, the courts in Maricopa County deal with so many contempts. They deal with contempt for this, for that, for the other thing—that I am afraid what happens is that the judges look at a contempt as "Oh, it's just another contempt and it's not as serious."
>
> . . .I would see files where a person was found in contempt of court five, six, seven times and nothing was done about it. He would be found in contempt. The court would say, "I am entering a finding that you are in contempt and you can purge yourself of contempt by not doing it again."[165]

Judicial Attitudes Toward Spouse Abuse

Several judges who testified freely expressed the opinion that domestic violence is not a major issue. In Pennsylvania, for example, a judicial panel from Cumberland County was asked whether they viewed the problem of spouse abuse as one of serious magnitude:

> **JUDGE SHEELY.** I do not.
>
> **JUDGE SHUGHART.** Nor I.
>
> **COMMISSIONER SALTZMAN.** Justice Lyons?
>
> **JUSTICE LYONS.** I haven't had any. I can't answer that.
>
> **JUDGE SHUGHART.** If you haven't had any, it seems to me that does answer it.[166]

Perhaps because judges only see an estimated 1 percent of abuse cases,[167] they tend to underestimate the incidence of domestic violence in their jurisdictions. Police consultant Robert Frederick testified that if members of the judiciary did not see spouse abuse as a significant problem, it was only because they had not looked:

> I think any judge or district attorney who says that he doesn't have this problem in his area probably has his head firmly in the sand. It's there. He may not hear about it at the country club; it's not talked about there. The wife who shows up at the country club with a big pair of sunglasses

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[160] Brooks Testimony, *Harrisburg Hearing*, p. 48.

[161] Dowling Testimony, *Harrisburg Hearing*, p. 71.

[162] Irey Testimony, *Harrisburg Hearing*, p. 136.

[163] Kermott Testimony, *Phoenix Hearing*, p. 164.

[164] Ibid., p. 168.

[165] Novak Testimony, *Phoenix Hearing*, p. 242.

[166] Sheely, Shughart, and Meade Lyons Testimony, *Harrisburg Hearing*, p. 118.

[167] Martin Statement, *Consultation*, p. 213.

> hiding a black eye could tell him about it, but she doesn't brag about it. I haven't seen any research that does anything except support the thesis that there is a very substantial problem of spouse abuse.[168]

Whether or not they underestimate the incidence of spouse abuse, judges tend to discount the seriousness of those cases that do reach them. Raymond I. Parnas, who studied the judicial response to family violence, found such cases were "handled summarily and off-the-cuff."[169] Charles Schudson explained the frustration he experienced as part of a special battered women's unit in the Milwaukee District Attorney's Office:

> [D]espite our intensive screening, we often went into court to find out that the judge had not yet been educated. And we have to say, "Look, your honor, understand now that when there is a battery case coming from our battered women's department, it is one issued only after the most certain consideration of all other possible efforts. Do not cheapen the issuance of charges by looking at that man and saying, 'Oh, a family spat, um-hum, $50'."[170]

Marjory Fields voiced similar concerns:

> Judges sitting in criminal courts display the same prejudices as police and prosecutors, even though they see battered wives who have refused to be discouraged and have cooperated with the prosecution. Statistics. . .show that there are few prosecutions resulting from thousands of requests for warrants. This may indicate that only the most serious cases, in which the victim believes that jail is the only way to stop her husband's attacks and the prosecutor believes he has sufficient evidence for conviction, go to trial. Yet the judges treat these cases as though there had been no attempts to screen them out on the police and prosecutor level. They tell women to forget the injuries and reconcile with their husbands. Marriage counseling is ordered without consideration of the seriousness of the assault, or women are told to get a divorce and the case is dismissed.[171]

Several explanations are given for the apparent judicial insensitivity to the problem of spouse abuse, including lack of awareness, sexism, cultural bias, and conflicts between the different roles judges must play.

In Pennsylvania, a legal services attorney testified that one of the chief problems she encountered in representing battered women was the need for "education of the judiciary":

> I think there is a great lack of understanding of what abuse really is. . . .I have been shocked by some of the comments that have been made to me in the retiring room of judges. One judge said to me, "You know, women like to be beaten." And when I said "Your Honor, I don't think that's funny," he said, "That's what I hate about women. They have no sense of humor."[172]

A district justice in Harrisburg testified to his belief that quite often victims of domestic violence who filed charges and then dropped them were "playing games" with their spouses.[173] He distinguished between the type of victim who was sincere and the type who was simply trying to get even with her boyfriend because he had taken out another "chick."[174]

It appears that some judges believe that battered women are masochists or that they exaggerate the level of violence or the seriousness of their injuries in order to punish philandering husbands or boyfriends. More likely, however, such theories represent attempts to explain away the fact that while victims of spouse abuse want protection, they do not necessarily want to end their relationships with their abusers—a phenomenon that disturbs and perplexes many of the people to whom battered women must turn for help.

Because judges are removed in time and distance from the actual incidents of violence, they may tend to be emotionally removed as well. Leslie Nixon, director of the law project for battered women of Southern Arizona Legal Aid, addressed judges' seeming indifference toward abused women by examining the problem "from the point of view of the judge as a human being":

> [H]e is confronted with the situation in which the contempt hearing takes place often weeks after the violation has occurred, after the beating has been administered, after the wounds have healed. The woman is sitting there dressed nicely, looking fine and healthy, maybe. Bruises don't show. . . .The immediacy of it, the seriousness of it does not impress itself upon them. In fact, I have heard judges say, "This is not my role. My role is as a judge. It is the police's role to intervene in these situations and protect women and make arrests. It's not my role weeks later to suddenly throw the guy in the clink."[175]

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[168] Frederick Testimony, *Harrisburg Hearing*, p. 220.

[169] Parnas, "Prosecutorial and Judicial Handling of Family Violence," pp. 747–48.

[170] Schudson Statement, *Consultation*, pp. 93–94.

[171] Fields Statement, *Consultation*, pp. 256–57.

[172] Gold-Bikin Testimony *Harrisburg Hearing*, pp. 10–11.

[173] Pinamonti Testimony, *Harrisburg Hearing*, p. 75.

[174] Joseph Pinamonti, District Justice, Harrisburg, Pa., interview, June 2, 1980.

[175] Nixon Testimony, *Phoenix Hearing*, pp. 243–44.

Many commentators argue that sexism underlies the justice system's unsympathetic response to battered women. Judge Lisa Richette, of the Court of Common Pleas of Philadelphia, for example, sees both wife battering and the response to it as based on a foundation of women's inequality in law and society:

> [T]hroughout history women have always been subordinated to men and their brutalization is a direct byproduct of that subordination. In the master-slave relationship, the slave is totally vulnerable to this kind of brutalization. Now I'd like to talk about marriage, which has to be seen in that context. . . .It is important to note in this charming ceremony, the query "Who gives this woman away to marriage?" The father turns her over to the groom, a great moment in our wedding ceremony. That really bespeaks a cultural truth, because in the eyes of the law, a wife stands before her husband in the position of a daughter, a child. . . .
>
> It seems to me that it is this infantilization process that all of us have to address. The American legal system is an anomaly in its stance toward women. It is underresponsive to women as victims, yet it overreacts to women as aggressors. You have only to read many legal opinions, even current ones, to perceive the negative energy that judges discharge against some women, using biblical terminology and all the rest.[176]

Leslie Nixon agreed:

> I think the root of the problem, wife beating, woman beating, is based in sexist attitudes about relationships between men and women, about the nature of marriage, about the function of a woman within a relationship. The old concept of woman as property. I think we like to think that our attitudes are sophisticated and that we are more modern and egalitarian, but when it comes to this area I think we have a long ways to go before we root that out; and that goes for not only the man who is a laborer down in the fields, that goes for doctors that live in big, expensive homes.[177]

Lynn Gold-Bikin testified that her committee is attempting to hold programs to educate the judiciary in various counties:

> [W]e find that one of the problems in the enforcement of the [Protection From Abuse] act is the innate prejudice that is brought by the bench to their role as judges—the attitudes that women like to be beaten, the attitudes that we will not put a man out of his house for this because it goes on in every family.[178]

On the other hand, Arizona attorney Thomas Novak, testified that he did not think judicial indifference to battered women was necessarily related to the male domination of the American system of jurisprudence:

> I think that there is kind of an idea that problems between a man and a woman, you know, are their own problems. . . .And I think it's just that there is some sort of an idea that if you enjoy the marital relationship, that that gives you the privileges. . .to do anything that you want with your respective spouse. . . .You know, maybe it goes back to the cave times when they bopped their spouse on the head with the club and [dragged] them home as accepted conduct.[179]

Instead of approaching spouse abuse as a widespread social problem involving criminal conduct, many judges view such cases as isolated incidents of aberrant behavior more appropriately dealt with by the family or by social service agencies than by the court. In Pennsylvania, for example, a shelter employee testified that:

> [A] woman was told in my presence by a district justice that "We don't wash our dirty linen in public."
>
> These are strong feelings, very often expressed, about the place of domestic violence in the family; it stays there, belongs there.[180]

In a sense, such judges are merely echoing the teachings of their culture. Judges, however, are responsible for enforcing the laws that make it a crime to beat one's spouse. Instead, many judges become confused about whether their role is to uphold the law or to uphold the integrity of the family unit. When faced with abuse cases, judges have dismissed complaints "solely on the irrelevant basis that a divorce action was pending."[181] They have refused to grant protection orders evicting abusers from their homes on the basis that because the victims had pictures of their bruises, they were "obviously preparing for litigation."[182]

Some judges, believing that divorce will resolve what they see as a "family" problem, "routinely refer women to divorce court and dismiss the criminal charges without inquiry into the allegations or circumstances of the case."[183] Marjory Fields described one judge's failure to understand the true nature of spouse abuse and his own role in the criminal justice system:

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[176] Lisa Richette, statement, *Consultation*, pp. 129–30.

[177] Nixon Testimony, *Phoenix Hearing*, p. 244.

[178] Gold-Bikin Testimony, *Harrisburg Hearing*, p. 10.

[179] Novak Testimony, *Phoenix Hearing*, p. 244.

[180] Farber Testimony, *Harrisburg Hearing*, p. 25.

[181] Fields Statement, *Consultation*, p. 253.

[182] Hart Testimony, *Harrisburg Hearing*, p. 11.

[183] Fields Statement, *Consultation*, p. 258.

> In a recent case in Brooklyn a judge told the defendant that if he did not fight the divorce action he would consider dismissing the indictment for attempted murder. This discussion took place after the prosecutor requested that bail be revoked because the defendant was telling his wife's friends that he was going to kill her. Even though the victim was in hiding with her eight-month-old child, these threats made her fearful. She had been beaten five times during her pregnancy and had been stabbed four times during the attack that was the basis of the indictment. Her husband's continued pursuit of her finally led the prosecutor to take her and her child into protective custody in a secured hotel used for endangered material witnesses.[184]

At the same time, many judges are reluctant to enforce laws against spouse abuse because they see their role in dealing with "family matters" as one of preserving the family unit. Edwin Frownfelter, a legal services attorney in rural Pennsylvania, described this attitude as reluctance "to disturb a living relationship."[185]

At the Connecticut Advisory Committee hearing, two judges were asked if they thought the goal of keeping families intact was a legitimate role for the court. One judge responded as follows:

> I think it is. I think it should be. It's a goal. It's part of the oath that every lawyer takes when he is admitted to the bar. In any divorce action he is involved in, he is going to do his best to effect a reconciliation. As you know, the divorce statutes have built-in provisions with regard to effect reconciliation if possible because it's believed, and I think rightly so, in our State that the family life is the best institution for a State.[186]

The other judge agreed, reiterating, "It's built into our law to effect reconciliation if at all possible."[187] The Advisory Committee saw the judges' testimony as suggesting "that they believe the goal of 'keeping the family together' overrides the criminal charges lodged against persons referred to the family relations division" and as implying "that there is no incompatibility between family unity, the interest of the woman, and the execution of justice."[188]

Perhaps because they think they must try to save the family at all costs, many judges have been accused of putting undue pressure on abused women to settle their cases out of court. Mr. Parnas observed abuse cases in Detroit and found that:

> If the prosecution is pursued, a judge may attempt to "string the case out" long enough for the parties to resolve the problem and then dismiss the case. Assuming this does not occur and a finding of guilt ensues, Detroit judges. . .in most cases, place the defendant on probation.[189]

Maryanne T. Rebstock, a trial commssioner in the private criminal complaints division of the Philadelphia Municipal Court, is responsible for trying to resolve disputes before they go to court. In an interview with Commission staff, she described her personal motivation in spouse abuse cases as helping to save relationships, particularly when there are children involved.[190]

While helping couples learn to resolve their differences without violence and thereby strengthening their familial bond is a worthy goal, it should not override battered women's needs for protection. Witnesses expressed strong feelings against using preservation of the family as a basis for public policy on wife battering. Leslie Nixon, for example, testified:

> [S]omething that cannot be emphasized too much is that we are talking about criminal conduct here. . . .We are talking about conduct that has been decided by the legislature of Arizona to be unacceptable conduct, to be conduct that is to be sanctioned; and there is no exception made for people who are married, people who live together, or people who were once married, even though that is the way it is treated, as if there is an exception, as if this is not criminal conduct.[191]
>
> I believe that the goal of social policy where battered women are concerned should be the protection and safety of the women and children, and that it should be up to the individual women involved to make a determination as to whether they want to save the family.[192]

Judge Juanita Kidd Stout, of the Court of Common Pleas of Philadelphia, defended the judiciary and assured the Commission that not all judges fail to understand or address the plight of abused women:

> The only thing I have to say about judges is that we range all the way from horrible to excellent. While some of the

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[184] Ibid., p. 259.

[185] Frownfelter Testimony, *Harrisburg Hearing*, p. 198.

[186] *Connecticut Report*, p. 14.

[187] Ibid.

[188] Ibid.

[189] Parnas, "Prosecutorial and Judicial Handling of Family Violence," pp. 749.

[190] Maryanne T. Rebstock, Philadelphia, Pa., interview, Apr. 18, 1980.

[191] Nixon Testimony, *Phoenix Hearing*, p. 235.

[192] Ibid., p. 248.

> horrible ones, I am sure, have done all the things that they have been accused of doing, I will assure you that many judges are most objective and sympathetic. Being judges of credibility, we do not always discount what the wife says.[103]

Experts agree that changing judicial attitudes and practices in abuse cases is crucial. The task is all the more arduous because of the role played by judges as the highest officers of the court:

> Prosecutors are prohibited from appealing dismissals or dispositions [that] are technically on the merits. Without appellate review, judicial discretion is virtually unfettered. In New York, even the passage of strong new laws accompanied by much publicity did not quickly change judicial attitudes. Negotiation is the only tool and its success depends completely upon the good will and openmindedness of the judges. Decisions are not written when judges routinely dismiss wife beating charges. Only a campaign of citizen court watching can complete the data to prove judicial practices and note the kind of prejudiced remarks often heard from judges. Attempts to change judicial practices will indeed prove the most difficult.[104]

In the meantime, those who represent battered women must take judicial attitudes into account when planning their case strategies. In Arizona, for example, imprisonment is mandatory for defendants convicted of all criminal offenses except nonviolent first offenses.[105] Prosecutor Stephen Neeley testified that his office makes a point of ensuring that abuse cases are treated as violent crimes under this statute:

> I think that our problem is in many instances the fact that the courts will not cooperate. If we have a serious enough assault, for example, and there has been a threat of imminent death, we can take the judgment out of the court's hands and cause it to be a mandatory sentence situation.[106]

Whatever the underlying cause of judicial neglect of battered women—whether it is cultural myopia, sexism, blaming the victim, or simple ignorance—the fact remains that judges have the power to decide the ultimate outcome of the most serious cases of spouse abuse. If judges misapprehend the true nature of domestic violence, they will only exacerbate the problem.

County Attorney Ray Cloutier, in a statement before a New Hampshire Advisory Committee consultation, summed up his views on the role of the courts this way: "I realize I have painted a bleak picture for the battered woman, but I've tried to give you the practical realities which the battered woman faces in our court system."[107]

As the highest officers of the court, judges have a responsibility to provide leadership in solving the problem of spouse abuse. Instead, judges who are indifferent and unwilling to impose any meaningful sanctions on abusive spouses convey a message to both victims and their abusers that the courts will not stop the violence. Moreover, judges influence police, prosecutors, and other members of the justice system in formulating their own attitudes and policies for handling spouse abuse cases. By and large, judges have missed the opportunity to play a constructive role in coordinating the activities of the various components of the justice system so that it can respond effectively to the needs of battered women.

Findings

Finding 5.1: Although civil and criminal remedies to spouse abuse are most effective when used in conjunction with one another, there is confusion between these types of remedies, which undermines enforcement of both.

Finding 5.2: Most cases of spouse abuse never reach courts of general jurisdiction. Entry-level courts generally resolve those cases police or prosecutors have not diverted previously.

Finding 5.3: There are advantages and disadvantages inherent in both civil and criminal remedies to spouse abuse, but some judges prefer one type of remedy and use it exclusively.

Finding 5.4: When abusers are convicted, judges seldom impose sanctions commensurate with the seriousness of the offenses or comparable with sanctions for similar violence against strangers.

Finding 5.5: Although civil orders prohibiting abusive conduct or excluding abusive spouses from their families' homes fill a distinct need not met by criminal remedies, such orders are not available to many battered women.

Finding 5.6: When abusers violate protection orders, many judges fail to impose meaningful sanctions.

Finding 5.7: Many judges approach abuse cases as isolated incidents of aberrant behavior between consenting adults rather than as examples of a widespread societal problem.

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[103] Juanita Kidd Stout, statement, *Consultation*, p. 32.

[104] Fields Statement, *Consultation*, pp. 259–60.

[105] Ariz. Rev. Stat. §§13-604(g), 13-1204 (1978).

[106] Neeley Testimony, *Phoenix Hearing*, p. 221.

[107] *New Hampshire Report*, p. 18.

Chapter 6

Diversion Programs

With increasing attention being focused on domestic violence, more pressure has been put on law enforcement agencies and the judicial system to recognize spouse abuse as criminal conduct. At the same time, however, alternatives to the criminal justice process have been sought. One major alternative that has rapidly developed is the use of diversion programs.

In its broadest sense, diversion is the process by which complaints of criminal behavior are channeled away from the formal criminal process with no finding made of guilt or innocence and no punishment imposed for the alleged criminal behavior. Commonly addressing "victimless" crimes, the first Federal and State diversion programs applied to narcotics addicts.[1] The report of the correction task force of the National Commission on Criminal Justice Standards and Goals defines diversion as:

> formally acknowledged efforts to utilize alternatives to the justice system. To qualify as diversion such efforts must be undertaken prior to adjudication and after a legally prescribed action has occurred. Diversion implies halting or suspending formal criminal proceedings against a person who has violated a statute, in favor of processing through a noncriminal disposition.[2]

Diversion programs take many forms. Typically, the programs seek to screen out the less serious cases and send the parties to counseling, mediation, arbitration, or some other process to settle the problem. Diversion has also been defined to include probationary programs in which an assailant will be tried and found guilty, but, rather than sentenced, sent to a counseling or therapy program. If the defendant completes the program successfully, his record is expunged (that is, cleared of any reference to the act or subsequent proceedings), and no further action is taken against him.

For purposes of this report, diversion programs include pre- and post-trial programs such as mediation, arbitration, mandatory counseling as a condition of probation, and hearing officer programs.

The formalization of diversion programs, in general, is relatively recent, dating back to a 1967 recommendation for their use by the President's Commission on Law Enforcement and the Administration of Justice.[3] Soon thereafter, model programs, many funded by the U.S. Department of Labor, were established in cities around the country. Criteria to determine who was eligible for diversion from the formal criminal process were established for each program. Common to the early programs was the limitation that no one accused of a crime of violence was eligible to participate.[4] Many State statutes that authorize the use of diversion programs contain a comparable provision.

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[1] "Pretrial Diversion from the Criminal Process," *Yale Law Journal*, vol. 83 (1974), pp. 827, 830 n. 20.

[2] Anna T. Laszlo and Thomas McKean, statement, *Battered Women: Issues of Public Policy*, a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., Jan. 30–31, 1978 (hereafter cited as *Consultation*), p. 330.

[3] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967), p. 133.

[4] Ibid., p. 832.

Connecticut's pretrial program, for example, is limited to "persons accused of a crime, not of a serious nature";[5] California limits participation to those accused of crimes that have been "charged as, or reduced to, a misdemeanor";[6] and Ohio permits participation by dangerous offenders who "did not cause, threaten, or intend serious physical harm to any person."[7]

The California statute, "Special Proceeding in Cases Involving Domestic Violence," is among the most recent legislative enactments and deals only with diversion of domestic violence cases. As is typical of most diversion statutes, the California statute requires no admission of guilt from the defendant.[8] In determining the defendant's eligibility for diversion, considerations such as the nature and extent of the injury inflicted on the victim, prior incidents of domestic violence, and any factors that would adversely influence the likelihood of successful completion of the program are taken into account.[9] Additionally, the defendant must have had no conviction for an offense involving violence for 7 years before the current offense, never had parole or probation revoked, and not have been diverted to any program for the past 5 years.[10]

If an abuser meets all of the criteria, the probation department prepares a report of its findings and recommendations to the court, taking into account such factors as community and family ties, prior incidents of violence, demonstrable motivation, and other mitigating factors todetermine whether the abuser would benefit from education, treatment, or rehabilitation.[11] The court then holds a hearing, considering the report and any other relevant information, and either diverts the case or allows it to proceed through the formal process.[12] If the defendant performs satisfactorily during the period of the diversion program, the criminal charges are dismissed, the arrest is deemed never to have occurred, and no information obtained during the prediversion process or the program itself is admissible in any action or proceeding.[13]

The battered woman's role under this statute, as in most others, is almost nonexistent. Furthermore, given the coercive nature of most abusers and the dependent nature of most abused women in a spousal relationship, it is relatively easy to secure the consent of the defendant to participate in a diversion program and to minimize a previous history of violence that may affect his acceptance into the program. The decision to divert rather than prosecute under a statute like California's, however, has serious implications for the victim. The lack of an admission of guilt from the abuser, coupled with the requirement that "demonstrable motivation and other mitigating factors" be included in the report to the court, not only erases any stigma that would attach in the formal criminal process, but also raises the issues of provocation and the victim's role in her own abuse.

According to Marjory Fields, a legal services attorney who has been involved in this area for more than 10 years, the expression from authorities of a strong and strident disapproval of violence is crucial to battered women, and the overuse of diversion instead of vigorous prosecution in cases involving domestic violence sends a clear message to an abused woman:

> they [prosecutors] are denying her the protection she needs. She is being taught that there is no one more powerful than her husband who either can or will compel him to stop beating her. In cases of repeated wife beating, criminal prosecution restores some of the power balance that the husband has destroyed by his violence.[14]

The use of diversion programs to handle domestic complaints outside of the formal criminal process has not come about without criticism that crimes of violence are not appropriate divertible offenses. Some experts in the area are wary of a system that attaches little significance to criminal activity that occurs in a relationship between two people, spares the abuser the stamp of "wrongness" that would accompany a successful prosecution for his acts, and often views the victim as a party to her own abuse.

The effectiveness of such programs has also been questioned. Marjory Fields criticized diversion programs:

> Diversion to community dispute centers and social work services has become an end for prosecutors. The goal is reducing case loads rather than careful selection of those

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[5] Conn. Gen. Stat. §54–76p (West Supp. 1980).

[6] Cal. Penal Code §1000.6(a) (West Supp. 1981).

[7] Ohio Rev. Code Ann. §2935.36(A)(2)(a) (Supp. 1980)

[8] Cal. Penal Code §1000.6(c) (West Supp. 1981).

[9] *Id.*, §1000.8(a).

[10] *Id.*, §1000.6(a)(1)(2)(3).

[11] *Id.*, §1000.7(b).

[12] *Id.*, §1000.8(a).

[13] *Id.*, §§1000.9–1000.11.

[14] Marjory Fields, statement, *Consultation*, p. 252.

cases which are appropriate for prosecution based on severity of the injuries and prior history. Family violence is deemed minor without regard to evidence before the prosecutor. Even when community dispute centers return cases to the prosecutor after having made decisions that there was abuse, prosecutors refuse to accept these cases back for trial.[15]

Along with criticism have also come statements of support for diversion programs. Often, however, these grow out of a frustration that diversion programs are all that is available to a battered woman:

> Unlike many of the people who champion diversion for wife abuse cases, we are not suggesting that it is a good idea because the victims want nothing more than to save the marriage and/or help their attackers but because the criminal justice system itself is unlikely to provide any help beyond confining a few of the most violent men.[16]

Because of the criminal justice system's failure to deal effectively with domestic violence cases, advocates, battered women, and members of the criminal justice system have come to rely on other remedies. These programs play a central role in the problems of a battered woman and an evaluation of their success or failure is crucial to an understanding of their importance as a remedy for victims of domestic violence.

Informal Hearings

Cases of domestic violence can be diverted at any time in the criminal system; most often they are diverted prior to prosecution.[17] Author Jennifer Baker Fleming points out that the earliest form of diversion is the system that allows a victim to file a private complaint against her assailant after the prosecutor decides not to initiate prosecution.[18] In this situation the parties are generally encouraged to drop the charges or resolve them informally.[19] If the complainant is adamant, formal prosecution may result.[20] Ms. Fleming points out that this procedure was developed to eliminate minor cases from the prosecutors' caseloads and is a common technique used in many jurisdictions.[21]

One informal process used to resolve domestic disputes is through "hearing officer programs" or "family divisions" of prosecutors' offices. Although the system provides a forum for victims of domestic violence, the climate of such a hearing may not be conducive to the victim's speaking freely about the history of her abuse and making an informed decision about the avenues available to her, free of fear and coercion from the defendant and/or hearing officer.[22]

The Los Angeles City Attorney's Office has instituted a domestic violence program that has, as one of its components, a preexisting "office hearing program." At an office hearing, a hearing officer lawyer listens to both sides of the story. The victim speaks first; then the defendant, after being informed of his constitutional rights, can give his side of the story.[23] A certain amount of mediation takes place at these hearings.[24] The guidelines set out by the Los Angeles City Attorney's Office state that the primary purpose of a hearing in a domestic violence case "is to assist the determination whether there is a reasonable likelihood a criminal prosecution will result in conviction."[25] The city attorney's office suggests that reviewing attorneys recommend a hearing when:

> 1. the victim sustained no visible or internal injuries (mere scratches or redness of skin are not considered "visible" injuries);
>
> 2. the victim sustained minor injuries and continues to reside with the suspect;
>
> 3. the victim expresses a desire to "drop charges" even though the suspect's conduct was aggravated; or
>
> 4. the attorney evaluating the case concludes there is a substantial likelihood a necessary witness will not cooperate with the prosecution.[26]

The hearing officers, who receive special training in domestic violence, interview the victim and respondent, explain the court process, and record the statements of both.[27] After the hearing, the hearing officer may choose one of four dispositions:

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[15] Ibid., pp. 30–31.

[16] Jennifer Baker Fleming, *Stopping Wife Abuse* (New York: Anchor Press, 1979), p. 203.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] Ibid.

[22] Del Martin, *Battered Wives* (California: Glide Publications, 1976), pp. 111–12.

[23] Susan Kaplan, interview in Los Angeles, Calif., July 16, 1980 (hereafter cited as Kaplan Interview).

[24] Ibid.

[25] Los Angeles, City Attorney, *Domestic Violence Program Manual, 1980* (2nd ed.), p. 20.

[26] Ibid.

1. He or she can resolve the case if no further action is required.
2. If the complainant and respondent do not appear, or if one fails to appear, the hearing is reset.
3. The hearing officer can continue the case for resolution; the victim and/or respondent is then referred to social service agency, and the hearing officer checks the progress of the counseling.
4. If the facts satisfy the crime charge standards and the victim is cooperative, the hearing officer will recommend that a complaint be filed.[28]

The family relations division of the Connecticut Court of Common Pleas counsels individuals with domestic problems and investigates misdemeanor charges involving family members.[29] In 1977, the family relations division received 8,412 cases from the court. Of these, 5,733 were sent back to the court for disposition, and more than half were not prosecuted.[30] The remaining 2,679 cases were resolved administratively—either conciliated or dropped.[31] The family division's stated goal is: "if at all possible, it is our primary action to save families. . . .Our office does [everything possible] to keep the family together." This goal, however, neither addresses the issue of the harm done to children who grow up in a violent family nor distinguishes between preserving the family unit with the abusive spouse versus supporting a nonviolent and viable family.[32]

The family relations officers interview both parties when a complaint is referred from the courts and make a recommendation back to the court. The most common recommendation is not to prosecute the case, and the court accepts the recommendation in almost all cases.[33] The family relations counselor usually holds a joint interview that lasts 15 to 30 minutes, but may take as long as an hour.[34] According to women who have been through such an interview, this procedure is severely limiting from a victim's perspective. One woman who was persuaded to drop charges said:

> During the sessions with the family relations officer the second time, there was a great deal of talk; but he finally ended up suggesting that I drop charges the second time, because, obviously, this was not helping the situation at all; and I was not accomplishing anything by pursuing the charges. So I did sign a paper saying that I would drop the charges.[35]

Another woman expressed her frustration at the hearing officer's lack of understanding:

> The first time [he was arrested] we went through interviews with the Family Relations. The second time we did also, and I had to explain to the family relations officer that I was afraid to say much of anything in front of this man; and the family relations officer said, "I can't understand why anybody would be afraid of a man she had been living with all this time." And obviously, he did not understand my fear.[36]

Although it is understandable that prosecutors, given their heavy caseloads, will attempt to set priorities for those cases they choose to prosecute, in instances where physical injury has occurred, "hearing examiner" programs may not be the best alternative.

Mandatory Counseling and Therapy

Diversion programs that require the defendant to receive counseling or some other form of therapy usually place the defendant under the authority of an agency in the criminal justice system, under which violation of the diversion agreement can result in some criminal action. This form of diversion can be imposed before or after trial.

In a pretrial diversion program, the prosecutor will generally agree to defer prosecution, and if the defendant successfully completes a course of therapy, charges will be dropped. In a post-trial diversion program, the counseling is a condition of probation, and if the defendant does not complete the program, he can be jailed.

Diversion programs based on some kind of mandatory counseling are currently popular. As with other diversion programs, counseling programs, especially pretrial ones, have come under attack from advocates working with battered women and batterers because they often require that the woman share the blame for her spouse's attack on her.[37] A legal services attorney at the Harrisburg hearing explained her objections to the process:

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[27] Ibid., pp. 5–6.

[28] Ibid., pp. 8–9.

[29] Connecticut Advisory Committee to the U.S. Commission on Civil Rights, *Battered Women in Hartford, Connecticut* (April 1979) (hereafter cited as *Connecticut Report*), p. 11.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Ibid.

> I think that a court has a discretion to order counseling, but I think that mandatory counseling is not helpful. I think that until the person, the batterer, recognizes very seriously the nature of his acts and any very strong righteous feelings about the wrong of what he's done, counseling doesn't do any good. I think that it is our experience that a batterer, when he is directed to go to counseling, not having recognized the very serious problem that he has, treats it very manipulatively and, therefore, just has been able to slide around the law and the woman that he has abused.
>
> It is one more way for him to take control over her by going to a session and doing nothing with that session. It creates hopes for her that he'll change and it just doesn't happen.[38]

Many advocates criticize the use of mandatory counseling in battering situations:

> From my perspective, the primary purpose of counseling is to stop the violence and, unless the counselor keys into the batterer's problem with violence instead of the nature of the marital relationship, there will be no change, so that at some point when we have educated the counseling, therapeutic community outside of the shelter movement to the need for that kind of very directive, clear, in my perspective, righteous counseling about what appropriate behavior is and how one controls one's violence, then perhaps we will see some effectiveness in the counseling forum. At this point I see there is almost none.[39]

Pretrial diversion programs have been criticized because they allow an abuser to avoid criminal action for his behavior. These critics believe that diversion is only appropriate after a batterer has been convicted:

> We are talking about, one, a legal problem that should have legal action and legal remedies such as prosecution. I don't think we should treat it, as you were saying earlier, any differently than somebody who robs a bank because the bank robber happens to have this kind of pattern in their background. We are going to take them over and give them 2 weeks of counseling and everything is going to be just fine. I think we need to talk about prosecution and talk about using the legal system to maximize, first of all, the idea, the concept, the belief that beating people is wrong even if it is your wife. That is not right and it is not sanctioned in this country, in this historical moment, and I think we need to clearly state that, that it is not sanctioned. That is not the attitude we frequently come across.[40]

In Santa Barbara, California, the district attorney's office established a pretrial diversion program in 1978, the family violence program, which is a component of the community action commission. The program received a $249,167 grant from the Law Enforcement Assistance Administration in 1978 to develop a model for different responses to domestic violence. The program consisted of three major components: law enforcement and legal services, family services, and public information and training.[41]

An objective of the program was to have some effect on the handling of domestic violence cases by the judicial system and law enforcement. A special unit was established in the Santa Barbara County District Attorney's Office,[42] and it produced a model for more aggressive prosecution of domestic violence cases and a model to offer counseling as an alternative to prosecution.[43] In cases involving minimal violence, the offender was offered a "preplea diversion" option—if the offender completed a counseling session and went 1 year without further police contact, the case would be dropped by the district attorney.[44] The deputy district attorney attempted to convince the victim of the desirability of diversion by saying: "[H]e will have no record, receive no jail time, won't lose his job, suffer no public humiliation. We'll just get him some counseling, and isn't that desirable."[45]

The pretrial diversion option, however, did not achieve the expected results due, in part, to the compulsory nature of the counseling. Therapy or counseling is rarely productive unless the individual voluntarily commits himself to attempting to change his behavior as an evaluation of the counseling component indicated:

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[37] Fields Statement, *Consultation*, p. 251.

[38] Barbara Hart, testimony, *Hearing Before the U.S. Commission on Civil Rights, Harrisburg, Pennsylvania*, June 17–18, 1980 (hereafter cited as *Harrisburg Hearing*), p. 9.

[39] Ibid., p. 13.

[40] Ellen Lyon, testimony, *Hearing Before the U.S. Commission on Civil Rights, Phoenix, Arizona*, Feb. 12–13, 1980 (hereafter cited as *Phoenix Hearing*), p. 23.

[41] Santa Barbara, Calif., Community Action Commission, grant application, *Summary*, p. 1.

[42] Richard A. Berk, Sarah F. Berk, and Donileen R. Loseke, "Preliminary Evaluation of the Santa Barbara County Family Violence Program," n.d., p. 5.

[43] Ibid., p. 6.

[44] Ibid.

[45] Ibid., p. 12.

> A small number of offenders and victims participated in counseling and there is no evidence of benefits. Perhaps the most important flaw was the naive notion that offenders would sincerely participate after being referred on a mandatory basis. In fact, most seemed to "stone wall." The counseling component was also undermined by a belief widely held by offenders and their attorneys that local judges would hand down relatively light sanctions for domestic violence and that therefore (rather than seek diversion into counseling), it was better to take the criminal justice process to its natural conclusion.[46]

One of the counseling psychologists added:

> Men are learning that they won't get a stiff sentence. I frequently get the statement that they come (to counseling) because they didn't want to spend the money to fight it, but that if they fight it they would probably get a 10-day suspended sentence. Further, since one of the goals of the D.A. unit was to show the community that there would be stiff sentences for violence within the family, the diversion program was actually hurting this program goal. In the spring months, the D.A. unit also found that some men would not accept the diversion program when offered to them. They would rather take their chances by going through the system, hoping for a light sentence.[47]

Since the inception of the district attorney's unit, the program model for treatment has changed. The pretrial diversion option is not now as readily available, and the emphasis is now on more aggressive prosecution with the imposition of counseling as a condition of probation.[48]

The San Francisco City and County Attorney's Office has implemented a family violence project, the goal of which is to improve service delivery both to victims and offenders in family violence cases.[49] When a felony complaint is processed through the district attorney's office, it has already gone through the general works section of the San Francisco Police Department where statements have been taken from the defendant, victim, and witnesses.[50] According to the district attorney's office, the only cases ever dropped are misdemeanors where there has not been serious injury.[51] If the victim does not wish to prosecute and it is a repeat case, it will automatically be sent to court where the victim must state reasons for not prosecuting. The judge then makes a decision recommending release, prosecution, diversion, and/or treatment for the defendant.[52] If the victim agrees to prosecute in a felony case, the defendant may ask at the preliminary hearing to be allowed to plead guilty and be placed on probation with counseling. If the case is a first offense, this is usually permitted.[53]

Misdemeanor arrest reports are received daily at the district attorney's office from the San Francisco Police Department's records division. For those cases of domestic violence involving an offender's fourth offense, criminal charges will be filed. The defendant in these cases normally pleads guilty and receives probation and treatment.[54] For other misdemeanors, the district attorney's decision to charge is based on the following considerations:

- Whether the violence is likely to reoccur.
- The chances of reconciliation.
- Who is at fault.
- Whether the situation is aggravated to the point where criminal sanctions should be applied.
- Whether better alternatives than prosecution exist.
- Information on the incident report, victim and defendant's criminal record, rap sheet, statements by the victim and witnesses.
- The wishes of the victim.[55]

Among the options available to the district attorney are diversion for first-time offenders, informal arbitration, advising the victim to apply for a peace bond, and prosecution.[56]

If a case goes to the probation department, for diversion, the court obtains a report from that department, and the case is referred to the investigation division for determination of eligibility and suitability, consistent with the mandated criteria.[57] Suitability is determined by an assessment of the defendant's willingness to participate; his ability to understand the full meaning of the diversionary process; the seriousness of the offense; his background and social history; his marital status, living arrangements, and financial status; and his relationship with the victim and their capability to work jointly on the problem.[58]

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[46] Ibid., p. 3.

[47] Ibid., p. 13.

[48] Ibid.

[49] Martha P. Wilson, "System Analysis for the Family Violence Project, Office of the District Attorney, City and County of San Francisco" (Oakland, Calif.: Consortium, Inc., 1980), p. 1.

[50] Ibid., p. 28.

[51] Ibid.

[52] Ibid.

[53] Ibid., p. 29

[54] Ibid., p. 30.

[55] Ibid.

[56] Ibid., p. 31.

[57] Ibid., p. 34.

[58] Ibid.

Upon receiving the report, the judge decides whether or not to divert the case. If the defendant is diverted, he is referred to a probation officer and to a treatment program. A biannual progress report is required.[59] The diversion program requires a minimum stay of 6 months and a maximum stay of 2 years.[60] At the end of 6 months, an evaluation is made by the supervising officer followed by a recommendation to continue treatment or dismiss the case.[61]

One of the Nation's larger diversion programs is located in Miami, Florida. Funded by the Law Enforcement Assistance Administration, this domestic intervention program is located in the Dade County State's Attorney's Office. The program is divided into the prearrest prevention program (designed to provide immediate crisis intervention counseling and referral to appropriate treatment)[62] and the postarrest component (designed to utilize the justice system to bring the violence under control so that family therapy and/or counseling can be of benefit to the defendant and the victim).[63]

In the prearrest component, referrals are most often made by the police, but are also made through various community agencies.[64] The emphasis of the prearrest component is usually crisis intervention and referral to needed services. The possibility of filing charges is explored with the victim through the paralegal department of the State's attorney's office.[65] Program staff act as advocates for the victim for the express purpose of getting the batterer into a treatment program.[66]

In the postarrest component, the emphasis is on using the criminal justice system as leverage in gaining control over the violence so that counseling can help both the batterer and victim.[67] When a defendant enters the postarrest component, the State's attorney's office defers prosecution while the defendant receives counseling. If treatment is completed, the charges are dismissed; if the defendant fails to complete a counseling program successfully, the case is prosecuted.[68]

Each morning, personnel of the postarrest component go to the Dade County jail to interview defendants charged with a domestic violence offense.[69] All pertinent arrest affidavits are reviewed, and defendants are interviewed within 24 hours of the arrest.[70] Defendants are accompanied to bond hearings and recommended for release if they agree to participate in the domestic intervention program.[71] No one is released without the approval of the victim.[72]

Arraignment takes place within 10 days, at which time diversion of the charges occurs if the victim approves of the diversion and if the defendant agrees to seek help, has no severe mental illness or history of long-term psychiatric treatment, is not "severely violent in nature"—even if a prior record exists—and has not caused the victim to suffer a permanent disability or critical injury.[73]

During the first three quarters of 1980, 178 cases were referred to the postarrest unit and 142 were accepted into the program.[74] Statistical data on these three quarters are shown in table 6.1. Demographic data on the client population for the third quarter of 1980 are shown in table 6.2.

The available statistics from the Miami project indicate that the program is having some success in resolving domestic cases through an informal process. It is clear, however, that very serious offenses are still being diverted out of the criminal justice system. For the third quarter of 1980, 59 cases were channeled to the domestic intervention program; 44 involved direct physical abuse. Of the 44 cases, a majority of the clients diverted were charged with aggravated assault or aggravated battery; the remaining cases involved assault and battery, assault, battery, or battery on a police officer.[75]

Miami also has a pretrial intervention program that diverts cases away from the criminal system. The pretrial intervention program, however, will

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[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] State of Florida, 11th Judicial Circuit, State Attorney's Office, "Domestic Intervention Program Annual Report: Initial Grant Period, July 1, 1978–December 31, 1979" (hereafter cited as Annual Report), p. 5.

[63] Ibid., p. 14.

[64] State of Florida, 11th Judicial Circuit, State Attorney's Office, HEW Grant Application, State Attorney—11th Judicial Circuit, domestic intervention program, Miami, Fla., "Comparative Overview," app. 3 (hereafter cited as Comparative Overview).

[65] Ibid.

[66] Ibid.

[67] Ibid.

[68] Annual Report, pp. 11–12.

[69] Comparative Overview.

[70] Ibid.

[71] Ibid.

[72] Ibid.

[73] Ibid.

[74] Domestic intervention program, 1980 cumulative program data (on file at Commission headquarters).

[75] Ibid.

TABLE 6.1
Dade County Domestic Intervention Program, Postarrest Unit Data, First Three Quarters 1980

A. *Case intake*	
Total cases interviewed	178
Total cases found ineligible	36
Total cases accepted for participation	142
B. *Case dispositions*	
Total case dispositions	166
Total unsuccessfully terminated	31
Total successfully terminated	135
Favorable completion rate	81%
C. *Inprogram recidivism*	
Total unsuccessful terminations due to rearrest	7
Inprogram rate of recidivism	2

Source: Dade County Domestic Intervention Program, 1980 cumulative program data (on file at U.S. Commission on Civil Rights).

TABLE 6.2
Dade County Domestic Intervention Program, Postarrest Unit, Case Intake Data, Third Quarter 1980

Subject:	No.	%	Victim No.	%
Sex:				
Male	41	69	19	32
Female	18	31	40	68
Total	59	100	59	100
Racial/ethnic group:				
Black	29	49	29	49
White	14	24	15	26
Spanish	14	24	13	22
Other	2	3	2	3
Total	59	100	59	100
Relationship between subject & victim:				
Husband/wife			30	51
Ex-husband/Ex-wife			4	7
Boyfriend/girlfriend			13	22
Parent/child			6	10
Step parent/step child			0	—
Siblings			1	2
Other			5	8
Total			59	100
Living arrangements during program:				
Together			32	54
Separately			27	46
Total			59	100
Referral source:				
Public defender			1	2
Assistant state attorney			10	17
Private attorney			1	2
Court			24	40
PTR/DIP joint release			14	24
Police			0	—
Safe streets			0	—
Victims' advocate program			0	—
Safe space			1	2
Comprehensive alcohol program			0	—
Comprehensive drug program			0	—
Citizen dispute settlement program			0	—
Health & rehabilitative services			1	2
Paralegal department			0	—
Self referral			2	3
Victim			1	2
Other			4	6
Total			59	100
Principal charges deferred by program:				
Assault & battery			4	6
Assault			1	2
Battery			5	9
Aggravated assault			19	32
Aggravated battery			14	24
Assault on police officer			0	—
Battery on police officer			1	2
Resisting arrest with violence			0	—
Child abuse			2	3
Child neglect			0	—
Lewd & lascivious on child			0	—
Burglary			4	6
Trespassing			1	2
Disorderly conduct			1	2
Criminal mischief			0	—
Other			7	12
Total			59	100

Source: Dade County Domestic Intervention Program, 1980 cumulative program data (on file at U.S. Commission on Civil Rights) not divert crimes of violence, while the domestic intervention program's clients consist primarily of individuals who have committed an act of violence involving another person.[76]

Interviews with the director of the Miami project revealed that only first offenders are permitted into the domestic intervention program. Those who violate the terms of the program are sent back to the State's attorney for prosecution, and most often these cases are dismissed or the defendant is placed on probation.[77]

A man who assaults and batters a woman he does not know is not offered the option of correcting his behavior prior to being charged and taken to trial. Although offering an individual the opportunity to correct and change abusive behavior is not in itself objectionable, treating those committing violent acts against a spouse differently from those committing violent acts against a stranger may only serve to foster the belief that domestic violence is not as serious, or is somehow less a crime, than stranger-to-stranger violence.

Unlike mediation and arbitration programs, diversion programs place more emphasis on the criminality of the defendant's behavior. The pretrial diversion programs that mandate counseling are proving less effective than post-trial diversion that involves a probationary sentence. In Santa Barbara, the county attorney's office moved its emphasis from pretrial to post-trial diversion because it found that defendants were not taking pretrial counseling seriously.

Although the efficacy of both kinds of diversion programs is debated, the issue they present is how many chances society should give perpetrators of crimes involving physical violence. In the misdemeanor sections of the San Francisco City and County Attorney's Office, offenders will still be diverted even after their fourth offense.

Most criticism of diversion programs is directed at pretrial diversion because it is seen as allowing criminal behavior to continue without sanction. Pretrial settings offer little incentive for real change; an abuser merely needs to control his behavior for a short period of time. Experts see post-trial diversion as a more viable option, since there is a clear incentive for change if a prison sentence is involved.

Mediation Programs

Mediation diversionary procedures now being used in cases of domestic violence have received mixed reviews because of questions about the propriety of using such programs in cases involving acts of violence. Such programs typically remove the case from the criminal justice system and involve the complainant and the defendant in reaching some amicable solution to their situation. No blame is placed on either party, and both parties must share equal responsibility for making compromises and resolving "their" problem. There is substantial criticism of the use of mediation and arbitration because these procedures take the criminality out of spouse beating, in essence telling society that this type of violence is not a crime. Further, critics believe that these techniques place an additional burden on the victim. The typical battered woman, they say, is frightened, alienated, and bears tremendous feelings of guilt for having caused her own abuse[78] and when asked to choose between mediation and prosecution, she may feel she is acting inappropriately by deciding to pursue prosecution. An additional criticism of the use of mediation programs is that they have become "dumping grounds" for prosecutors who prefer not to deal with domestic cases.

At the Commission's 1978 consultation on battered women, Marjory Fields discussed such programs:

> When violence is more serious than a single slap, kick, or punch and becomes a series of blows inflicted by the stronger party with intent to harm the weaker party, then there is no equality. The weaker person is the victim, and the stronger person is the batterer, who wields the power. This is the battered wife's situation and one reason that mediation will not work to stop wife beating.
>
> Wife beating is not a behavior pattern that can be altered in a single 2-hour mediation or arbitration session. At the point when the woman seeks police and prosecution intervention, beatings may have been a frequent occurrence for several years. . . .[79]

Ms. Fields described the limitations of such programs:

> Mediation is not advisable because it requires that the battered wife share the blame for her husband's attack on her. . . .

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[76] Barbara Kaufman, program director, domestic intervention program, Miami, Fla., telephone interview, Jan. 14, 1981.

[77] Ibid.

[78] William F. McDonald, ed., *Criminal Justice and the Victim* (London: Sage Publications, 1976), p. 31.

[79] Fields Statement, *Consultation*, pp. 251–52.

> Complaints have been made that where community dispute centers exist, prosecutors divert all family offense cases to the centers. When the Miami Citizen's Dispute Settlement Center tries to send serious cases it cannot resolve back to the prosecutor, the prosecutor refuses to accept them. Diversion can become an end in itself instead of a rationally applied alternative.[80]

Tucson's victim witness program in the Pima County Attorney's Office includes a mediation service known as the "mutual agreement process." At the Phoenix hearing, the supervisor of the mediation project, Paul Forgach, defined it as a process of bringing the parties "together to sit down with the mediator and talk about ways of resolving their problems."[81] He described the major goal as producing a peaceful settlement, which could be a conciliation, a cooling-off period, or a breaking up of the relationship. He noted, "We're not looking to determine who is guilty or innocent."[82]

Clients are referred to the mediation program through various agencies, the most direct being the police. There are several mediation sites at Tucson police substations, and mediators also ride with police officers. The program also receives referrals from the city prosecutor's office and the county attorney's office when parties file for peace bonds.[83] In addition, volunteers who also work for the victim-witness program as crisis intervention counselors use unmarked police cars with radios to aid in reaching the scene of a dispute in time to assist the police.[84]

The rationale for using mediation rather than the criminal process is that:

> charging someone with a criminal offense and hoping to successfully prosecute as well as attempting to meet the expectations of persons involved are often times impossible. The efforts of the Police Department, Prosecutors, and Courts are misdirected. The parties themselves are not interested in prosecution. They want safety, assurance, and help for the offender.[85]

At the mediation sessions, certain ground rules must be adhered to by both parties:

1. No physical violence or screaming.
2. No "putting down" another person; no name calling.
3. One person speaks at a time with no interruptions.
4. Talk only in the present tense.
5. Everyone remains in room until meeting ends.
6. No burden of proof need be met; this is not an investigation.
7. Mediators are not judges; this is not a court hearing.
8. Mediator will be neutral.
9. Mediators direct the flow of meeting.[86]

Two mediators, usually a male and a female, participate. The mediators first extract from the parties a reaffirmation of their commitment to work out their problems peacefully. Then ground rules are stated, prohibiting interruptions, physical violence, screaming, and "putting down each other."[87]

Mr. Forgach described the next step in the process:

> Then we ask each party to state what it is you want: "What do you want from this person?" And we list those wants, get them all out of them, list them on a wall, and we ask the other party listening if they have any questions about that, and then we solicit the wants from the second party.[88]

Parties are encouraged to concentrate on the present, rather than talking about the past:

> They have a whole lot of war stories. . . .They want to relay one incident after another, and they do a lot of thinking about those things and it is hard for them to listen to each other. We try to interrupt them when they're doing that and say, "Hey, could you pursue talking about what you want happening," [to] try to bring them back to that structure.[89]

If the parties are able to reach an understanding on their desires and concessions, they enter into an oral agreement or written contract.[90]

At the Phoenix hearing, Leslie Nixon, a legal services attorney in Tucson, discussed the mediation program:

> [W]e do not think that mediation is the place to resolve a situation in which one party systematically and repeatedly subjects the other party to beatings.
>
> The whole mediation setting by its very definition is a setting, a neutral setting. The mediator is a neutral

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[80] Ibid.

[81] Paul Forgach, testimony, *Phoenix Hearing*, p. 188.

[82] Ibid.

[83] Ibid.

[84] David Lowenberg, project director, victim/witness program, Office of the Pima County Attorney, interview in Tucson, Ariz., Jan. 8, 1980.

[85] *Phoenix Hearing*, exhibit 24.

[86] Ibid., exhibit 22.

[87] Forgach Testimony, *Phoenix Hearing*, p. 190.

[88] Ibid.

[89] Ibid.

[90] Ibid., p. 191.

> mediator, a neutral arbitrator. Both parties are deemed to be on equal ground, equal footing, equal power. They are equal parties to an equal dispute. . . .
>
> But we believe in our experience with battered women that this is [a] totally unacceptable approach to solving a battering or to having even an interim kind of solution, and that the reason for that is because. . .first of all, they are not equal parties at all.[91]

Ms. Nixon explained the shortcomings of mediation:

> [Y]ou do not have equal parties here. The mediation program. . . .does not blame anybody. . . .No one is given any guilt. You just talk about future conduct. And we think that that is pretty unacceptable when you talk about one party who has committed criminal acts on another party. . .has injured that other person, which is a woman in 99 percent of the situations.
>
> So, the message that the battered woman gets in this mediation program is again the message she is getting from the rest of the system and society in general, and that is, "Your husband will not be punished for this activity.". . . .[S]ociety does not think this serious enough to treat it as the criminal act that it really is under our laws. So the message to the man is, "Keep on doing it, you know, nobody is going to punish you for this. You can get away with it." And that is the message that law enforcement, the prosecutor's office, and the mediation program give to the women who are victimized and to the men who beat them.[92]

Mr. Neeley, the Pima County attorney, views this as an added advantage because "quite frankly, if the program is administered through the county attorney's office, there is always a hammer that exists that more or less encourages people to participate in a mediation process as an alternative to prosecution."[93] Advocates, however, see this "hammer" as possibly a coercive measure to lure victims into a resolution they think is mandatory only to receive a contract that is not enforceable upon breach:

> MS. NIXON. We have run into [misunderstandings] because the mediation program is part of the county attorney's office and. . .most people when they encounter the judicial system, be it civil or criminal, are confused by the whole thing and intimidated whatever their educational or economic background.
>
> And what happens is if the prosecutor decides to allow the person to have mediation as an option, the MAP [mutual agreement process] personnel generally contact the woman, the victim, and the other person also [and] says to the victim, "I am from the county attorney's office," and. . .they explain the process and our clients generally have come away from that thinking it was not an optional process, thinking that it's just another step in the system and finding out later that once again. . .this particular process is not going to punish her husband or take him to task in any way. . . .And some of our clients have come away thinking they have an enforceable document in their hand, a contract that is drawn up, and it really isn't.[94]

The mediation supervisor discussed the enforceability of the agreements signed at a mediation proceeding:

> VICE CHAIRMAN HORN. When you have reached that agreement, does that agreement go before a judge in any way?
>
> MR. FORGACH. It does not.
>
> VICE CHAIRMAN HORN. That is strictly an administrative agreement?
>
> MR. FORGACH. That's right.
>
> VICE CHAIRMAN HORN. So if it is broken, what are the sanctions?
>
> MR. FORGACH. . . .[I]f we are contacted or if we follow up and find that it has been broken. . .we do pursue contact of the other party to see what's happening with that, and we may ask them to come back and discuss it further. . . .
>
> VICE CHAIRMAN HORN. Okay. So this doesn't resemble probation in any way?
>
> MR. FORGACH. No, it does not.
>
> VICE CHAIRMAN HORN. This is sort of just goodwill counseling and trying to get the parties to see their problems and agree to do something about it?
>
> MR. FORGACH. With a high initiative from our office. We do not wait for them to come to us for help. We pursue them. I think that's really the basic difference than what really goes on in the usual social service models.[95]

This mediation program is similar to many mediation and arbitration programs now in use around the country. The controversy surrounding such programs is not directed at the programs per se, but at the use of such programs to resolve disputes involving violence.

A similar mediation program in Dorchester County, Boston, Massachusetts, consists of a disposition panel, victim services, victim/witness assistance project, and mediation.[96] Referrals to the mediation unit are made by the clerk of courts, the district attorney, or the bench after arraignment.

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[91] Leslie Nixon, testimony, *Phoenix Hearing*, pp. 236–37.

[92] Ibid., p. 237.

[93] Stephen Neeley, testimony, *Phoenix Hearing*, p. 208.

[94] Nixon Testimony, *Phoenix Hearing*, pp. 237–38.

[95] Forgach Testimony, *Phoenix Hearing*, pp. 197–98.

If a case goes to mediation, the disputants are informed at length of the mediation component's intent and procedures. During the initial phase of the mediation session, it is explained to the disputants that the mediators only act as facilitators, that the mediation agreement should be one the parties can agree to, and that the agreement is not legally binding.[97] The complainant relates the incidents of the dispute and then the defendant is allowed to speak. There are also individual sessions. When an agreement is reached, the mediators present it in writing to the involved parties.[98] Following is an example of a typical successful mediation case:

> Y is a 36-year-old male who had been married to X for a number of years. On January 23, 1977, Y struck X a number of times, requiring her to go to the hospital with injuries to the face and hands. The incident resulted from a conversation X initiated after she had opened the mortgage statement and discovered that Y had not paid the bill for 2 months.
>
> X came to court and obtained a warrant and Y was arrested on January 26, 1977. The case was arraigned and referred to mediation. A mediated settlement was reached on January 27th.
>
> The agreement stated that both parties get along, they agreed to discuss their problems in private and not in front of the children; X agreed to not question her husband about the way he spends money, to not accuse her husband of seeing another woman, to not inquire about her husband's whereabouts with friends. If the agreement breaks down, X will return to court and file for separation. Y agreed to pay more attention to his wife, to spend more time at home, not to see another woman, not to take the children to another woman's home.[99]

A study of Dorchester program assessed a 2-year (1975–1977) sample of 86 spouse abuse cases in a Boston area district court and discussed the mediation component of the urban court program in Boston.[100] Both felony and misdemeanor charges were included in the study; the felony charges were reduced to allow the district court jurisdiction over them. Thirty-eight of the cases were felonies, involving assault and battery with a dangerous weapon, attempted murder, or assault with a dangerous weapon. The remaining 48 cases were misdemeanors, with 41 of these involving assault and battery.[101] In 21 cases no settlement was reached after referral to mediation, either because the parties refused to mediate, or because the parties were unable to reach an agreement.[102] These cases were referred back to the court for resolution with no punishment being imposed for refusal to attempt to mediate the problem.[103] Of the cases referred back, 13 went to trial; in 8 of these cases there was an admission to sufficient facts, and the court continued the case for 6 months to a year after which time the case was dismissed if no further difficulties arose.[104] In the two cases where there was a finding of guilty after trial, both defendants received suspended sentences, probation, and conditions of probation. In the remaining three cases that went to trial, there was a finding of insufficient evidence to warrant a court finding of guilt or probable cause.[105] Of the remaining 21 cases that were not settled by mediation and referred back to the court, 2 resulted in the defendant's default, 1 case was continued for a year, and 5 cases were dismissed at the request of the complainant.[106]

A settlement was reached after referral to mediation in 65 of the cases. Of these, 8 of the agreements subsequently broke down and 9 defendants defaulted.[107] Of the cases that broke down, 2 were continued without a finding after an admission to sufficient facts, probation was given in one case, and a 10-day commitment was given in another that involved a long series of violations.[108]

In this study, about 48 cases (56 percent) of the total sample of 86 actually resulted in a settlement being reached and the case being dismissed after mediation (see table 6.3).[109]

Of interest in the Dorchester study are the types of cases that were permitted to go to mediation. Of the 85 cases, 79 involved acts of aggression and violence against another. Thirty-eight of these cases were felonies reduced to misdemeanors to allow

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[96] Laszlo and McKean Statement, *Consultation*, pp. 327–59.

[97] Ibid., p. 344.

[98] Ibid., p. 345.

[99] Ibid., pp. 340–41.

[100] Ibid., p. 330.

[101] Ibid., pp. 332–33.

[102] Ibid., p. 335.

[103] Ibid.

[104] Ibid., p. 336.

[105] Ibid.

[106] Ibid.

[107] Ibid.

[108] Ibid.

[109] Ibid., p. 339.

TABLE 6.3
Dorchester County Court Program, Case Distribution by Charge and Disposition, November 1975-November 1977

Misdemeanor charge	**No. of cases**
Threats	4
Malicious destruction of property	1
Annoying calls	2
Assault and battery	41
Total	48
Felony charge	
Assault/dangerous weapon	4
Assault and battery/dangerous weapon	33
Attempted murder	1
Total	38
Total case sample	**85**

Settlement reached after referral to mediation

	Total
Dismissed after mediation	48
Settlement reached/subsequent breakdown	8
Default	9
Total cases	65

Nature of the mediation agreement

	Total
Agree to get along	25
Alcohol counseling	12
No contact	12
Drug counseling	1
Psychiatric counseling	1
Marriage counseling	6
Visitation	6
Financial agreement	11
Employment counseling	2
Restitution	3
Divorce	3

No settlement reached after referral to mediation

Reason	Total
Complaint refused	8
Respondent refused	2
No agreement reached	11
Total cases	21

Disposition of case	Total
Trial	13
Admission	8
Guilty	2
Not guilty	2
No probable cause	1
Continued without trial	1
Dismissed at request of complainant	5
Default	2

Source: Anna T. Laszlo and Thomas McKean, statement, *Battered Women: Issues of Public Policy*, consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., Jan. 30–31, 1978, pp. 334–40.

jurisdiction for mediation purposes; one of these cases involved an attempted murder. The only sentence imposed in all cases that failed mediation and involved further abuse was a 10-day confinement or suspended sentence.

Mediation was completed in a majority of the cases; however, there is no indication given of how many of these cases reappeared later in the system as a result of further violence. Mediation critics point out that felonies were reduced to misdemeanors to fit into the mediation program; repeat abusers suffered no penalties, or, at a minimum, very minor penalties for continued abuse of their mates; and victims of brutal crimes were asked to sit down and work out an agreement to try and "get along" with their attackers.

Advocates point out that mediation was conceived to address disputes involving persons of equal power. In a battering situation, the imbalance of power is obvious and often can result in the battered woman's acquiescing out of fear or intimidation. According to Leslie Nixon, mediation may be effective in resolving minor disputes, but not cases of violence:

> Mediation. . .can be effective, for instance, where there [have] only been verbal disputes between two parties or threats made by one party. But when you get into physical violence, our experience with the hundreds of women we have encountered in the last. . .6 to 9 months is that it's going to be repeated and things like sitting down together in a neutral setting is not going to have any effect. In fact, it's going to reinforce it. I think it causes more violence.[110]

Typically, violence in domestic settings repeats itself and escalates in severity.[111] In a sense, mediation can be seen as a windfall for the aggressor in a domestic situation. No penalty is involved if he goes through the procedure, is contrite, and resolves to get along with his mate. In addition, the abuser does not have to accept responsibility for his behavior, since the victim is also being asked to check her behavior and get along with her mate. Nothing in the mediation process indicates to the abuser that his acts of violence are criminal, even though the same acts would not be tolerated if committed against a stranger on the street. In *Battered Wives*, Del Martin points out:

> Police and prosecutors frequently assume these attacks are "one punch" fights, but when the twenty victims of Eisenberg and Micklow's study were hit, it was invariably more than once. Usually they receive a beating that lasted anywhere from five to ten minutes to over an hour. Once the beatings took place, they were usually repeated on a fairly regular basis. Wives in the study sustained such physical injuries as ripped ears, bald spots where hair had been pulled out, choke marks, concussions, miscarriages, fractured jaws, dislocated shoulders, broken arms, cracked ribs, and burns on the breasts and arms from lighted cigarettes or hot irons. A woman who finally works up the courage to file a criminal complaint against her husband for treating her to such abuse can hardly be expected to feel grateful for an investigator's gestures at mediation.[112]

Given a reasonable choice, many victims may chose to prosecute rather than be involved in mediation. As one judge at the Commission's consultation pointed out:

> it was my experience that quite a few of the people who were diverted to these mediation processes really didn't want to be there. They preferred to have their matter aired in court and have a judge either reprimand their spouses, arrest, send their spouses to jail, to have it on record and in court.
>
> To go into another room, or another area, whether or not he'd be in a courtroom building, seemed to take away their whole reason for having filed a complaint to begin with. I found that a lot of them that went through the mediation process still wanted their case to be tried as a regular case. Still they wanted the judge to have some sort of final say-so to the offending spouse, to threaten that if they ever do it again, the judge would throw them in jail or whatever. But I found that they were very reluctant in many instances to go through that process successfully.[113]

Findings

Finding 6.1: Prosecutors often use informal hearing procedures to screen out spouse abuse cases. Such informal settings tend to produce an atmosphere of fear and coercion for abuse victims, frequently result in no criminal action against defendants, and minimize any implication of wrongdoing by abusers.

Finding 6.2: Mandatory counseling for spouse abusers can be effective, especially after conviction when the counseling is a condition of probation. In many jurisdictions, however, such programs are available to defendants charged with very serious or repeat offenses, where diversion is generally inappropriate.

Finding 6.3: Mediation and arbitration, which are generally inappropriate for settling domestic problems where one party has been violent to the other, are still used as substitutes for prosecution in some jurisdictions.

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[110] Nixon Testimony, *Phoenix Hearing*, p. 247.

[111] Barbara Star, "The Impact of Violence on Families," scheduled for publication in *Conciliation Courts Review*, vol. 19, no. 2 (December 1981), p. 11.

[112] Martin, *Battered Wives*, pp. 111–12.

[113] Golden Johnson, statement, *Consultation*, p. 90.

Chapter 7

Shelters and Social Services

With a violent spouse and inadequate police protection, a battered wife is vulnerable both inside and outside her home. If she has escaped the violent home, she will often have nowhere to go and no means of support. Her problems are compounded if she has children with her. Such a woman may be aided by Federal, State, and local programs that provide support ranging from shelters to financial assistance to legal services.

Shelters

Safe houses, refuges, or shelters have become the cornerstone of support services for battered women who are unable to remain in their homes due to an abusive spouse.[1] In 1971 the international trend for the creation of shelters began in London with the establishment of Chiswick Women's Aid.[2] Since the founding of Rainbow Retreat in Phoenix, Arizona, in 1973, the first in this country,[3] many communities have opened shelters and hotlines to assist battered women. It has been estimated that there are more than 300 shelters in the United States,[4] a number far inadequate to meet the needs of the estimated 1 million[5] battered women in this country.

Shelter personnel believe that women who are victims of abuse need an environment of stability and safety for themselves and their children during the transition period after leaving an abusive situation. Consequently, shelters strive to be more than residences or temporary hotels for women during a crisis; they have the possibilities of becoming community-oriented facilities that provide women with continuing support against violence, discrimination, and economic deprivation.[6] In *Conjugal Crime*, Terry Davidson, describing the peer group support and decisionmaking found in one shelter, gave evidence of how a community-based shelter works:

> The residents stayed up until early morning, smoking and talking around the kitchen table about how they would solve their problems, enjoying the sense of friendship and supportiveness. This Saturday night turned out to be the most joyous and restful the house had known in ages. This women's shelter was indeed a place where the weary and troubled could lay down their burdens and get some peace. I felt as if I had embarked on a second visit.[7]

Anne Flitcraft said at the Commission's consultation that "it is only in the formation of new communities that battered women can overcome the isolation which characterizes their lives today."[8] According to Ms. Flitcraft, a battered woman's "isolation begins within the family. This isolation continues as women turn again and again to social service and law enforcement agencies and find not simply benign neglect, but further harm."[9] Ms. Flitcraft observed that society's negative response to the needs of abused women results in still further isolation of the women, as they come to realize that there is little help to be had and often the only choice is to remain within the family.[10]

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[1] Lenore E. Walker, *The Battered Woman* (New York: Harper and Row, 1979), p. 192. Safe houses are private homes and public facilities such as churches and shelters that provide temporary housing for women safe from battering spouses.

[2] Del Martin, *Battered Wives* (San Francisco: Glide Publications, 1976), p. 197.

[3] Ibid., p. 206.

[4] Jennifer Baker Fleming, *Stopping Wife Abuse* (New York: Anchor Press, 1979), p. 353.

[5] Delores J. Trent, "Wife Beating: A Psycho-Legal Analysis," *Case and Comment* (November-December 1979), p. 14.

[6] Anne Flitcraft, statement, *Battered Women: Issues of Public Policy*, a consultation sponsored by the U.S. Commission on Civil Rights, Washington, D.C., January 30–31, 1978 (hereafter cited as *Consultation)*, p. 113.

[7] Terry Davidson, *Conjugal Crime, Understanding and Changing the Wifebeating Plan* (New York: Hawthorn Books, 1978), p. 171.

Experts agree that battered women who are forced to leave their homes to protect themselves from their spouses exist in all ethnic and economic groups. These women come to shelters with varying needs and in various physical, emotional, psychological, and economic states. Testifying at the Commission hearing in Phoenix, the executive director of the Sojourner Center described a typical battered women arriving there:

> [Her] age is around 25. She has a little bit less than a ninth grade education. Probably has not worked at all. If she has worked, she might have worked as a waitress for 6 months, 8 months at one time or another.
>
> Usually, the average woman again has around three kids and that can go—we have had zero through—I think we had one woman in at one time who had 12 kids. So it covers quite a wide range.
>
> The woman, when she comes in, as I said, demonstrates a lot of stress type of responses. . . .She goes back and forth between weeping, feeling guilty, feeling as if it's her fault—What has she done to herself, her kids? Why didn't she cook hamburger instead of macaroni for dinner and then everything would have been okay?. . .
>
> Two minutes later or an hour later she is into a rage type of reaction and is very angry. . . .[11]

At the same hearing, the executive director of another shelter in Phoenix emphasized that victims of domestic violence come from all economic backgrounds:

> [B]asically our women that come into our center are not penniless women. . . .It's your women who is lower middle, maybe middle-middle class, and some wealthy women, wealthy women come into the center. . . .
>
> [A]nd I think that there is no big difference there, whether it's my center, Sojourner's, or any center across the country. Once that woman walks through the door, she is penniless. She may drive a Cadillac into the driveway, but she won't have any money to put gas into it.[12]

The witness said that on arrival the women "have no self-concept. Their feeling of worth is extremely low."[13] During a meeting on battered women of the Commission's New Hampshire Advisory Committee, Dr. Sheila Stanley, a psychologist for Central New Hampshire Community Mental Health Services, discussed the general low self-esteem of battering victims she counsels. She said:

> Most of the battered women didn't seem to think a lot of themselves before they were married, but whatever self-respect they had was shattered as the marriage went on. After a few years of being told that you're stupid, dumb, or no good, you begin to believe it. . . .Consequently, some of the women that we see feel they somehow deserve the abuse.[14]

Shelter staff seek to establish a system of working with shelter residents that will assist them in becoming self-directed, assertive, and independent. Although they usually come from situations where they are powerless and unable to assert themselves in even minimal ways, battered women, with the assistance of shelter staff and each other, learn to take control of their lives again, realizing they can choose to leave a battering situation and can, in fact, survive independently with their children. In Harrisburg, Debra Baldwin of the Women in Crisis shelter described the role of the shelter staff during the first crucial days after arrival:

> We found that if we, in the first few days of their stay in the shelter, just give them a lot of opportunity for ventilation of their feelings and give them some support in just sorting some things out, help them to focus on their own role in the crisis, that help them to understand what

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[8] Flitcraft Statement, *Consultation*, p. 113.

[9] Ibid.

[10] Ibid.

[11] Ellen Lyon, testimony, *Hearing Before the U.S. Commission on Civil Rights, Phoenix, Arizona*, Feb. 12-13, 1980 (hereafter cited as *Phoenix Hearing*), p. 9.

[12] Joanne Rhoads, testimony, *Phoenix Hearing*, p. 15.

[13] Ibid., p. 8.

[14] Sheila Stanley, statement before the New Hampshire Advisory Committee to the U.S. Commission on Civil Rights, a consultation, Laconia, N.H., June 18, 1979, p. 76 (hereafter cited as New Hampshire Advisory Committee Consultation), cited in New Hampshire Advisory Committee to the U.S. Commission on Civil Rights, *Battered Women and the New Hampshire Justice System* (June 1979), p. 4.

> happened in the crisis, that is the most helpful support that we can provide in those first 2 or 3 days.[15]

In addition, counselors at the shelter assist the women by helping them to focus on future goals and necessary immediate plans. She said:

> Our approach is very strongly to be nondirective and nonjudgmental. . .to the women.
>
> So our assistance usually is to start out by saying "You're here now. . . .What do you want to do next?". . . .
>
> And again, to be very careful in not giving her direction from what we think she should do, but rather, continually reinforcing the message that she needs to decide for herself what she wants to do next, whether that's going to be to return home or to find a new situation.[16]

Shelter personnel must also meet the diverse needs of the children who come from battering situations. "Children who witness violence between their parents suffer emotional trauma and often react with shock, fear, and guilt."[17] One woman described the reaction of her children to assaults by her spouse:

> The youngest girl screams and cries hysterically, yelling at her father to let me alone. The boy acts disgusted and retreats into himself. Lately, he's asked questions about why we married. My daughter says she won't ever marry. My oldest child screamed and became extremely fearful.[18]

Women coming to shelters often bring with them severely traumatized children who may be emotionally disturbed or have serious learning problems.[19] There is growing evidence that children who witness battering in their homes often grow up themselves to become batterers[20] or use violence as a means of resolving frustrations and problems. Shelter staff witness this trend in the children's behavior in the shelter:

> Other children, especially the adolescents, engage in various acting-out behaviors that make communal living in cramped quarters a horror. They often destroy the meager furnishings. Adolescent boys can be as violent as their fathers, and often find willing younger versions of their mothers in the adolescent girls. The theory that an abusing family begets a new generation of abusers is painfully observable in these safe houses.[21]

Shelter staff expend a great deal of time, energy, and resources attempting to reverse this trend,[22] but resources are scarce and the work of the shelters is done on a minimal budget.

Another important role of shelters is educating the public on the problem of domestic violence and the social and financial realities for the victims of such incidents. According to Women's Advocates, one of the first shelters in this country, "refuges (shelters) are the vitally necessary first step in eliminating domestic violence and oppression because they serve to make the problem visible and to meet the immediate need for protection."[23] Testifying at a hearing on H.R. 2977, a Federal bill that would have funded domestic violence programs, the State director of Minnesota's programs for battered women said:

> While shelters neither solve the problem of battering nor guarantee protection of *all* victims of partner assault, they are symbols in a community of the right of all people to be physically protected by the society in which they live. They are a constant reminder to the judicial, medical and social service systems of the need for change in the policy and attitudes of those systems toward the victims of one of this society's most devastating and archaic practices—wife-beating.[24]

Some shelters seek to raise public consciousness of the plight of battered women through television commercials, public speaking engagements, and programs for children in upper grades.[25] Many shelters have special projects to make social service agencies and police departments aware of the special needs of abused women and how they can best be served.[26]

Although shelters are still responding to battered women's immediate needs, they acknowledge the need to expand their education efforts to the general public with special emphasis on organizations such as those of the medical professions.[27] In Harrisburg, shelter representatives testified that they had conducted training at all the emergency rooms in the local hospitals and found more response there than from general practitioners.[28]

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[15] Debra Baldwin, testimony, *Hearing Before the U.S. Commission on Civil Rights, Harrisburg, Pennsylvania,* June 17–18, 1980 (hereafter cited as *Harrisburg Hearing),* p. 19.

[16] Ibid.

[17] Martin, *Battered Wives,* p. 22.

[18] Suzanne Prescott and Carolyn Letko, "Battered Women: A Social Psychological Perspective," in Marie Roy, ed., *Battered Women: A Psycho Sociological Study of Domestic Violence* (New York: Van Nostrand Reinhold, 1977), p. 86.

[19] Walker, *The Battered Woman,* p. 201.

[20] Ibid.

[21] Ibid.

[22] Ibid.

[23] Women's Advocates, "A Shelter for Abused Women and Their Children" (St. Paul, Minn.), brochure.

[24] Ellen Pence, statement, *Hearing Before the Subcommittee on Select Education of the House Committee on Education and Labor,* 96th Cong., 1st sess., 1979 (hereafter cited as *House Hearing),* p. 102.

[25] Melisa Fried, testimony, *Harrisburg Hearing,* p. 133.

[26] Lyon Testimony, *Phoenix Hearing,* pp. 10–11. Ann Farber, testimony, *Harrisburg Hearing,* p. 61.

Community education provides shelters the opportunity to inform the general public about the myths and realities of domestic violence. According to the authors of *The Shelter Experience*, a guide to shelter organization and management published by the National Clearinghouse on Domestic Violence, "The entire thrust of the movement against domestic violence must be toward the day when society will sanction and support the steps necessary to encourage disengagement from a violent situation, rather than supporting the institutions and traditions that imprison a person in that situation."[29]

Shelters often monitor how local police departments respond to victims of domestic violence. Many battered women report to shelter personnel that police do not provide protection from their abusers.[30] Joanne Rhoads of Rainbow Retreat shelter in Phoenix testified that the major complaint of abused women who were forced to call the police is that "police are insensitive to what is going on in the home, [and] that [women] are not advised of their rights."[31] According to a participant at the Connecticut State Advisory Committee's consultation who called the police:

> I was beaten, bleeding, and a mess. The police came and [my husband] left the house.
>
> It was a constant thing of my calling, the police coming, and he split. Finally, the police said, "If you don't keep him here, don't call us." And I said, "Would you prefer that I keep him here, and he'll kill me, and you can come back to take over?" They left. He came back and started in; and my girlfriend upstairs called the police. They arrived. Their response was, "Look lady, he says he didn't beat you. He wants to work things out. You're being unreasonable. Why bother pressing charges? He's going to be out in a little while, and he'll be back." I insisted they press charges. They finally said, "No, and don't call us again."[32]

Commission staff were informed in Phoenix that police responses to women's requests to file charges against abusive mates included saying that it was too late in the day to take a complaint, that there was no use in pressing charges, and that it was a civil matter and there is nothing the police can do.[33] Police response, however, was better when women had been to court to obtain temporary restraining orders, which are difficult to get.[34]

Shelter personnel and advocates working in the area of domestic violence are seeking to make police officers sensitive to the needs of victims of domestic violence. For several years, shelters in Phoenix tried unsuccessfully to establish and coordinate training programs on domestic violence for the police department.[35] In 1980 the department allowed each shelter to conduct class sessions in the police academy to familiarize recruits with domestic violence issues.[36] With these sessions, the shelters are seeking to sensitize new police officers to the complex area of domestic violence.[37] Joanne Rhoads outlined her objectives in recruit training sessions in her testimony at the Phoenix hearing:

> What we try to accomplish while we are there is not so much going in and telling them that "This is what we hear about you. Why don't you clean up your act? This is what is going on out there. This is what you are walking into. You are not walking into just a fight. You are walking into a pattern that has been established for a very long time, and. . .[w]e don't expect you to be counselors, but we do expect you to be sensitive to the problem that is going on. We would like to help you become sensitive to it and not get yourself to the point where you become ineffective in your role because of your being overly sensitive." Because there is a delicate balance that the police have to walk there, too.[38]

Ellen Lyons, director of Sojourner Center shelter in Phoenix, testified that she was "excited that [shelters] were offered the opportunity to. . .[conduct domestic violence training sessions with the recruits because]. . .it [was] the beginning of a dialogue between the police department and human service workers, human service programs such as ours."[39] Ms. Lyons indicated in her testimony that one of the major sources of problems in addressing domestic violence is the lack of communication and coordination among the agencies that are working with the problem.[40]

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[27] Baldwin Testimony, *Harrisburg Hearing*, p. 28.

[28] Ibid.

[29] National Clearinghouse on Domestic Violence, *The Shelter Experience—A Guide to Shelter Organization and Management for Groups Working Against Domestic Violence*, Domestic Violence Monograph Series, No. 4 (1980), p. 54.

[30] Walker, *The Battered Woman*, p. 206.

[31] Rhoads Testimony, *Phoenix Hearing*, p. 9.

[32] "Ms. F," testimony, Factfinding Meeting Before the Connecticut State Advisory Committee to the U.S. Commission on Civil Rights, Hartford, Connecticut, April 1979, p. 8.

[33] Patricia McGrath, Sojourner Center, interview in Phoenix, Ariz., Nov. 15, 1979 (hereafter cited as McGrath Interview).

[34] Ibid., Ellen Lyon, executive director, Sojourner Center, interview in Phoenix, Ariz., Nov. 15, 1979.

[35] Rhoads Testimony, *Phoenix Hearing*, p. 12.

[36] Ibid.

[37] Lyon Testimony, *Phoenix Hearing*, p. 10.

[38] Rhoads Testimony, *Phoenix Hearing*, p. 12.

She also testified that at least half of the recruits in one of the training sessions were concerned about how to respond to domestic violence calls.[41] The recruits wanted to know if there was something they could do to help solve the problem.[42] Responding to their inquiries, Ms. Lyons said that she made several suggestions:

> ". . .I feel that you do have a responsibility to intervene when somebody potentially is at risk of being hurt badly by separating, by taking the assailant away as an option, by informing the woman of her right to citizen's arrest if you feel that you cannot take the person in because you did not see any act of violence at the time, to inform the victim of crisis shelters in the area,". . .[and] to offer to provide transportation to that woman to a shelter or to her mother's or to a friend's home, to at least get away from the situation at that time.[43]

Stover Clarke, a police trainer for the Pennsylvania Coalition Against Domestic Violence, reiterated at the Harrisburg hearing the belief that police officers should not be expected to act as mediators:

> [I]f we give them a little bit of knowledge in crisis intervention, they will tend to use that and downplay the criminal side of the dispute.
>
> What I'm trying to do is instill in them. . .that it is a crime we're dealing with and, if a crime has been committed, it must go through the criminal procedure.[44]

Training for recruits is essential, but such training must also reach officers who have been on the force for many years, including superior officers. In Phoenix, only new recruits are required to participate in such training.[45] In fact, one shelter representative, in responding to a request by Commissioner Freeman for comments, agreed wholeheartedly with the following description of the systemic problem of lack of education of the justice system in the area of domestic violence:

> In the system of jurisprudence, you have not just the police officer, but you have the prosecutor and you have the judge, and the recruit would be a very small percentage of the people who would be approached.
>
> The problem which we have heard described this morning permeates the entire system, and it seems to me that there should be training for the entire police department, and it ought not to be one in which it's on an ad hoc basis where they would give you an opportunity to come down and participate in a briefing. It ought to be an inherent part of the program and also it should extend to the judiciary and to the prosecutor.[46]

Much is written about the necessity of safe houses and of the good work that dedicated shelter staff do with abused women and their children. The reality of the situation, however, is that throughout the country shelters are experiencing financial difficulties.[47] In most instances, shelter funding is meager,[48] and shelters, of necessity, must rely on students, volunteers, and workers from programs funded under the Comprehensive Education and Training Act (CETA) whenever possible to perform services that they are financially unable to obtain otherwise.[49]

Limited financial resources make it impossible for the short-staffed shelters to address all the problems involved in a woman's leaving an abusive situation. Educational and vocational training is limited in shelters because of lack of funds.[50] In addition, shelters frequently lack the necessary resources to deal with the extremely complex problems children present. Shelters attempt to provide care for infants, preschoolers, and school-age children, but usually do not have the resources to do so adequately.[51] Shelters are usually overcrowded and in general disrepair, with no funds to expand or to repair broken appliances.[52] Lack of resources leads to widespread sickness in the shelters because those who are ill cannot be isolated.[53] Finances make it impossible to staff a shelter with a nurse or doctor, so shelters must depend on the often unreliable volunteer services of community professionals.[54]

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[39] Lyon Testimony, *Phoenix Hearing*, p. 11.

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] Stover Clarke, testimony, *Harrisburg Hearing*, p. 214.

[45] Rhoads Testimony, *Phoenix Hearing*, p. 25.

[46] Lyon Testimony and inquiry of Commissioner Frankie Freeman, *Phoenix Hearing*, p. 26.

[47] Janice Moore, My Sister's Place, Women's Legal Defense Fund, Washington, D.C., *House Hearing*, pp. 124–25.

[48] Ibid.

[49] Lyon Interview.

[50] Walker, *The Battered Woman*, pp. 200, 203.

[51] Ibid., p. 201.

[52] Ibid.

[53] Ibid., p. 202.

At present, about 70 percent of the shelter programs piece their budgets together from multiple funding sources, public and private.[55] As a result, few shelters have secure funding and most face the possibility of closing each year.[56]

During the Commission's consultation, Shelly Fernandez of La Casa shelter discussed the unstable financial condition of shelters:

> We found we had need for money for the shelter, very badly. We didn't know what to do. So, we went to our local foundation and we got some small seed money grants. We still have that determination to keep getting money because our money is running out. We get it for 1 year, $5,000 here, and $6,000 there. Now we are in our third year. We still have determination, but we need your help.[57]

Echoing Ms. Fernandez' sentiments, Monica Erkler of Women's Advocates said:

> When. . . .she talked about the continuing problem in budgeting and the ever continuing search for funds, I thought of our position right now. We are preparing our sixth or seventh budget, I am not sure which. We are still scrounging for $5,000 and $10,000 here and there to make up a budget, which is over $200,000.[58]

This funding problem may be even more severe for rural shelters that must compete with urban shelters for funding from some sources. As a rural shelter representative at the Harrisburg hearing noted in describing her shelter's funding problems:

> The shelter facility is inadequate because of its size. . .because we have not received much financial assistance, we have been operating on private donations, fund raising, small grants, and have not been operating on. . .a large budget, and I think that a lot of the grants that we see do go to large urban areas and the rural areas are not usually considered. . . .[59]

This shelter's funding difficulties were increased when the county discontinued its assistance to the facilities because one commissioner felt that it was breaking up marriages by taking battered women out of the home.[60] The commissioners, however, allocated monies for protection of animals and beautification of the community.[61]

Fewer than 15 States have enacted laws providing funding for shelters, and most of this legislation does not guarantee permanent funding. Funding, even in these States, is generally not adequate to meet the needs of shelter programs.[62]

Funding patterns of Federal agencies and private foundations present still another problem for shelters.[63] In the past, Federal monies have been available for research projects only. Private foundations, though providing billions of dollars for community-based social service projects, have allocated less than one-fifth of one percent of that total to fund women's projects.[64] At the consultation, one shelter representative said:

> We don't want research and demonstration grants, we don't want any of those. We know what we are doing. We don't need the luxury of research grants. Women are suffering and hurting. We know the problems of the battered women, we need money to establish shelters to work on methods to share our knowledge with the thousands of people across this Nation who need to open shelters with adequate and ongoing funding.[65]

The problem of the inadequate funding of shelters is complicated by the reality that in the United States "[h]alf of the shelters are located in the 10 most populated and urban states, and some states have no shelters at all."[66]

A panelist at the Commission's consultation testified that currently, "the need for shelters far outweighs the number in operation."[67] Because of this shortage, shelters are unable to assist more than a third to a fourth of the families that need their sevices.[68]

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[54] Ibid.

[55] Cynthia Dames, chairperson, National Coalition Against Domestic Violence, testimony, *House Hearing*, p. 162.

[56] Ibid., pp. 141–42.

[57] Shelly Fernandez, statement (on behalf of Marta Segoura-Ashley, cofounder of La Casa de las Madres, San Francisco), *Consultation*, p. 103 (hereafter cited as Fernandez Statement).

[58] Monica Erler, statement, *Consultation*, p. 108.

[59] Fried Testimony, *Harrisburg Hearing*, p. 133.

[60] Ibid.

[61] Ibid.

[62] Dames Testimony, *House Hearing*, pp. 141–42.

[63] Del Martin, "Battered Women: Society's Problem," in James Robert Chapman and Margaret Gates, eds., *The Victimization of Women* (Beverly Hills: Sage Publications, 1978), vol. 3 of Sage yearbooks in Women's Policy Studies, p. 120.

[64] Ibid.

[65] Fernandez Statement, *Consultation*, p. 103.

[66] Blandina Cardenas Ramirez, Commissioner, Administration for Children, Youth and Families, Office of Human Development Services, Department of Health, Education, and Welfare, statement, *House Hearing*, p. 175.

[67] Moore Testimony, *House Hearing*, p. 124.

[68] Ibid.

Special Needs of Rural Women

The incidence of domestic violence is high in rural areas,[69] and victims of domestic abuse in these areas are often confronted with special problems that women in urban areas may not experience.[70] Edwin Frownfelter, a rural legal services attorney, summarized factors in the rural environment, such as traditional values, peer pressure, and physical isolation, that could lead to the high incidence of domestic violence:

> I think there are several. One is the strong sense of tradition. . . .
>
> There's a lot of pressure on individuals to maintain the family relationship. . . .Be a better wife and the problem will stop. This comes from the ministers. . . .it comes from the police. It comes from friends and family. . .and in a tiny. . .sealed society like Fulton County, that amount of peer pressure can be an incredible force for molding a women's behavior.
>
> There are a lot of women who are literally prisoners of their husbands, dependent on them for everything, for any kind of transportation, for their income, for the basic necessities of life, and it is a scary prospect for them to give all that up and go out and face what can be a very harsh and difficult life of poverty, especially where there are children involved, so they stay.
>
> As to the incidents of abuse, I think life in these isolated rural areas is kind of conducive to that kind of conduct. We have to face the fact that life in a rural area can be boring as can be. In a lot of situations, we have perhaps a husband who works. . .70, even 100 miles away. He gets up at 5 in the morning to go to his job. He gets back at 7 at night, dead, bone tired. What is he going to do? Mostly he just goes out to the bar, drinks for a few hours with his buddies, and comes home to a tense marital situation and a lot of times that's where the abuse comes.[71]

Additional problems rural women may encounter, such as untrained police officers, lack of legal aid, and scarcity of job opportunities, are further elaborated on in *A Monograph on Services to Battered Women:*

> [T]he likelihood of her suffering geographical and social isolation is great. This situation is compounded by a lack of anonymity if she does seek help. In some rural areas there is no training at all for police, much less specific training in domestic violence. Judges, who are responsible for signing warrants to enforce restraining orders, often are difficult to reach. . . .
>
> Legal aid is non-existent in most rural areas. Where it does exist, it is restricted to those citizens living in the county in which it is found.
>
> There are few jobs for which a woman can apply in a rural town. Furthermore, the findings of the Nebraska Task Force on Battered Women indicate that most rural women have worked only on the farm or in the house and have no marketable skills.[72]

When women are isolated, they often must rely on the State police to respond to calls for assistance in domestic situations. In many instances, the response to calls for assistance from abused women in rural areas is inadequate due to the distances police must travel to reach them.[73] According to one rural legal services attorney, the State police in Pennsylvania at one time had a written policy that they would not respond to domestic calls unless someone had been killed.[74] This policy, however, was changed after one shelter conducted training sessions on domestic violence for State police.[75]

The problem of isolation for the abused women in rural areas may be exacerbated by rural values.[76] At the New Hampshire Advisory Committee consultation, Olivia Henry, psychiatric social worker at the New Hampshire State Hospital, said:

> There's a great deal of violence and a kind of protectiveness and real pressure not to come forward or go public: "This is a family matter". . . .There's a kind of pressure on anybody who chooses to speak out, from the family and the community and I think from the police.[77]

Not only do rural values discourage battering victims from reporting domestic assaults, but geographic isolation of rural families often prevents neighbors from reporting such incidents.[78] Sgt. George Miville of the Manchester Police Department contrasted the urban and rural settings:

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[69] New Hampshire Advisory Committee Consultation, p. 2.

[70] Fleming, *Stopping Wife Abuse*, p. 371.

[71] Edwin Frownfelter, testimony, *Harrisburg Hearing*, pp. 488–91.

[72] U.S., Department of Health and Human Services, *A Monograph on Services to Battered Women* (undated), pp. 96–97.

[73] Fried Testimony, *Harrisburg Hearing*, p. 32.

[74] Edwin Frownfelter, interview in Chambersburg, Pa., June 4, 1980 (hereafter cited as Frownfelter Interview).

[75] Ibid.

[76] Olivia Henry, testimony, New Hampshire Advisory Committee Consultation, p. 94.

[77] Ibid.

> We do have apartments and houses being close by, [and] thin walls, [while] in a rural area someone could be raising all kinds of havoc in the farmhouse and the nearest other house could be a half-mile away and it isn't heard. We have a lot of calls from neighbors who hear things; whereas the people involved in that house where it's happening do not call. If there are not neighbors to hear, then the call never comes in.[79]

In small communities, the police force may be familiar with both parties involved in a family dispute. In cases where the officer is summoned to the house more than once, he may become intolerant of domestic violence victims who lodge more than one complaint. It is not uncommon for police to fail to respond to these calls. If this occurs, rural women and their children are without protection and if no shelter is available, they have no place to turn for help.[80]

Federal Programs

In the spring of 1979, Joseph Califano, then Secretary of Health, Education, and Welfare, established an Office on Domestic Violence within the agency.[81] This office was created to:

> provide a central focus for policy planning; keep track of current developments in service delivery, research, and evaluation of domestic violence projects, and coordinate these activities; help to develop a Department-wide research and evaluation agenda; serve as a focal point for information both within the Department and for other federal agencies and outside groups; assist other HEW agencies to improve services to victims of domestic violence; develop, collect, and disseminate information on domestic violence; work with other federal agencies to develop joint programs and activities; provide the staff support for the Interdepartmental Committee on Domestic Violence.[82]

During 1979 the Office of Domestic Violence focused on dissemination of public information and technical assistance, which included the creation of a national clearinghouse to develop, collect, and disseminate data on domestic violence.[83] With the Law Enforcement Assistance Administration, the office funded a family violence research project at the Center for Women's Policy Studies in Washington, D.C., which provides technical assistance on issues of domestic violence such as health, social services, criminal justice, and legal problems.[84] In addition, the center publishes a newsletter, *Response.*[85]

For fiscal year 1980, the Office of Domestic Violence was authorized $1.2 million in program funds. With this money, it focused on technical assistance programs, public awareness activities, and demonstration grants for comprehensive community services.[86] The Office no longer exists.[87]

The community development block grant (CDBG) program[88] is currently the primary source of Federal funds to local units of government for "the development of viable urban communities."[89] Before the implementation of the block grant program in 1974, cities and local governments were allocated Federal community development monies through a number of categorical grant programs. When Congress changed to the block grant program, many people thought that local control of the planning, programs, and implementation of activities would enable the specific needs of communities to be met.[90]

The revitalization of shelter facilities has been included in the Department of Housing and Urban

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[78] George Miville, testimony, New Hampshire Advisory Committee Consultation, p. 51.

[79] Ibid.

[80] Shirley J. Kuhle, president, Nebraska Task Force on Domestic Violence, statement, *House Hearing,* p. 323.

[81] Susan Cohen, *Funding Family Violence Programs: Sources and Potential Sources for Federal Monies* (Center for Women Policy Studies, November 1979), pp. 2-3.

[82] Cardenas Ramirez Testimony, *House Hearing,* p. 172. Office of Domestic Violence Projects funded as of October 1980 include advocacy demonstration grants to: Rockland and Family Shelter Center for Advocacy and Supportive Services, P.O. Box 517 Nyack, New York; Domestic Intervention Program, State Attorney's Office, 1351 NW 12th Street, Miami, Florida 33215; W.O.M.A.N., Inc., 2940 16th Street, Suite 202, San Francisco, California 94103; and Family and Children's Service, 115 West Sixth Street, Davenport, Iowa 52803.

[83] Cohen, *Funding Family Violence Programs,* p. 2.

[84] Ibid., pp. 2-3.

[85] Ibid., p. 3.

[86] Ibid., pp. 2-3.

[87] Jan Kirby Gell, program analyst, National Center on Child Abuse and Neglect, Department of Health and Human Services, telephone interview in Washington, D.C., Sept. 14, 1981.

[88] Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified at 42 U.S.C. §5300-5317 (1976 and Supp. III 1979)).

[89] Ellen Pence, *Emergency and Long-Term Housing* (National Coalition Against Domestic Violence, undated), p. 5.

[90] Ibid.

Development's regulations as an activity eligible for block grant funds.[91] Before the regulations specifically listed shelters, many battered women's programs were discouraged from applying for funds to rehabilitate their facilities.[92]

In some instances, CDBG funds allocated to rehabilitate a structure being occupied may include temporary relocation funds for the current occupants.[93] In addition, a community development block grant may contain funds for public service activities.[94] If a domestic violence program accentuates a community development strategy for a neighborhood, the program's organizational expenses are eligible for reimbursement as a public service.[95]

The section 8, existing housing, program provides rental subsidies for low- and moderate-income families.[96] Battered women's groups can make this Federal housing program more responsive to the needs of women living in shelters by: (a) asking local agencies to give priority to these women for receiving certificates of eligibility for housing; (b) encouraging qualified local organizations to apply for section 8 where it is not being used; and (c) monitoring the activities of the section 8 programs in their communities.[97]

During fiscal year 1978, a specialized family violence program was established within the Law Enforcement Assistance Administration (LEAA) to fund local projects focused on improving the response of the criminal justice system to domestic violence.[98] Funded projects must involve public and private community agencies such as law enforcement, social service, and medical personnel in their activities.[99]

In 1978 the program funded 16 projects and in 1980, 25 were funded. Since LEAA was being phased out at the end of the fiscal year, new projects were not being funded in 1981.[100]

Under the Title XX program,[101] the Department of Health and Human Services provides monies to States for social services for public assistance recipients and for prevention of neglect, abuse, or exploitation of children and adults.[102] States are required to submit annual social service plans, including information on administration and services, for HHS to approve. To receive Title XX funds, a program has to be included in the State plan. Beginning in fiscal year 1980, Title XX funds were made available for emergency shelter as a protective service to "an adult in danger of physical or mental injury, neglect, maltreatment, or exploitation. [Under this provision, a]ny adult can be provided shelter for a maximum of 30 days [during] any 6-month period."[103]

Through public assistance training grants, Title XX funds are available to institutions and students for training in social service delivery and to domestic violence programs for initial and inservice training of staff. To be eligible for these grants, programs must be included in HHS-approved comprehensive social service plans for their respective States.[104]

Shelters report that certain problems exist with the program. According to the executive director of Rainbow Retreat in Phoenix:

> [W]e have the Title XX money, which is Federal money, and it has to be matched with one-fourth of clean money, which we call it, which is any kind of money that you can raise or produce that is not mixed with any Federal money, which in some centers—it creates quite a drain on them because there is just no way that they can raise this kind of money. . . .
>
> Categorical has to be one-third of that income eligible, which means that for our clients we need AFDC [aid to families with dependent children] clients or SSI [supplemental security income] clients. . . .
>
> Once you get past that problem. . .there is the problem of when this woman comes in. . .she may be married to a man that is making $20,000 to $30,000 a year. And in order for her to become eligible for the Title XX funding she has to sign saying that she is not planning on ever returning to this man, which puts her in somewhat of a bind because many times she is sitting there saying, "But I don't know if I am or not."[105]

Another problem with the program is the time lapse between the shelters' rendering of services and Title XX reimbursements:

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[91] Ibid.

[92] Ibid.

[93] Ibid., p. 6.

[94] Ibid.

[95] Ibid., p. 13.

[96] Ibid.

[97] Ibid., p. 15.

[98] Ibid., p. 16.

[99] Ibid., p. 84.

[100] Ibid., p. 89.

[101] Social Services Amendment of 1974, Pub. L. No. 93-647, §2, 88 Stat. 2337, and amended Pub. L. No. 96-272, Title II, §207(b), 94 Stat. 526 (codified at 42 U.S.C. §1397-1397e (1976 and Supp. III 1979)).

[102] Cohen, *Funding Family Violence Programs*, p. 9.

[103] Ibid., pp. 9–10.

[104] Ibid., pp. 3–4.

[105] Rhoads Testimony, *Phoenix Hearing*, p. 19.

> [W]e provide the services and we do not get paid for the services that we provide for from 6 to 8, to sometimes 12 weeks after we have provided the services, which makes it very difficult for a small nonprofit agency such as ours. It completely destroys any sort of concept of cash flow. We are constantly in crisis, obviously.[106]

Pennsylvania's Department of Public Welfare is successfully using funds allocated under Title XX of the Social Security Act to support a shelter network across the State.[107] In past years, a few domestic violence programs were funded by Title XX when regional offices of the department had money left after disbursements from their regional allocations. Under this procedure six or seven shelters in the State had contracts under the Title XX plan for different eligible program services in various amounts.[108]

A representative from the Pennsylvania Coalition Against Domestic Violence testified about how the shelter network finally got included in the State Title XX plan:

> Shortly after '76, two programs within the State were funded through the regional offices of the department of welfare, and in the following year several more programs were funded. They were appreciative of that funding, believe me. It really ended the bakesale orientation that most of the programs were operating on; however, what we were finding was that the policy was so inconsistent: in one area there would be funding for emergency room and board; in another area it would only be for counseling, and. . .the amounts were greatly differing. . . .
>
> [I]n order to address the inconsistencies, we started to talk among ourselves. We also supported our programs to enter into. . .the public hearing process. . . .We were very fortunate in having contacts within the department of welfare that did include us in the preplanning meetings, and we were exceptionally fortunate when the administration, under Governor Thornburgh, did appoint Helen O'Bannon as secretary, and we saw a real policy change. . . .[109]

Beginning July 1, 1980, the department of public welfare allocated nearly $2 million to fund 28 domestic violence programs across Pennsylvania. "About half of the programs funded are shelters and the other half are either counseling centers or hotlines."[110]

The 96th Congress considered H.R. 2977, the Domestic Violence Prevention and Service Act, legislation that would have provided funds for services to victims of domestic violence.[111] The bill, which passed in each house of Congress but did not receive approval at the conference report stage, would have authorized $65 million over a 3-year period to State and private agencies.[112]

The act was intended to increase the participation by States, local public agencies, private nonprofit organizations, and individual citizens in efforts to prevent domestic violence.[113] The bill would have provided for technical assistance and training relating to domestic violence programs to States, local public agencies, private nonprofit organizations, and individual citizens as well as establish a Federal interagency council to coordinate Federal programs that could assist battered women. In addition, the legislation would have created information-gathering and reporting programs relating to domestic violence.[114]

Social Services

A woman who flees a violent home in the middle of the night often has no money and only the personal effects that she can carry. This woman may be forced to turn to public social service agencies for financial assistance to subsist, counseling, and family services.[115]

Documentation is generally required during the application procedure to verify certain statements on the application form.[116] Testimony at the Phoenix hearing indicated that documentation is often difficult to supply:

> They [the social service agencies] require documentation of birth certificates on both she and the children, rent receipts, and stuff like that. Most of the time when the woman is fleeing the situation she is not going to have time to pick up her rent receipts or utility deposits, her children's birth certificates, and her birth certificate.

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[106] Lyon Testimony, *Phoenix Hearing*, p. 20.

[107] Sherry Knowlton, testimony, *Harrisburg Hearing*, pp. 171–72.

[108] Ibid., p. 172.

[109] Susan Kelly-Dreiss, testimony, *Harrisburg Hearing*, pp. 174–75.

[110] Ibid., p. 175.

[111] H.R. 2977, 96th Cong., 1st sess., 125 Cong. Rec. H1317 (1979). This bill was reintroduced in the House on Feb. 4, 1981. H.R. 1651, 97th Cong., 1st sess., 127 Cong. Rec. H370 (1981).

[112] Ibid. Center for Women Policy Studies, *Response to Violence in the Family*, vol. 4 (October 1980), p. 1.

[113] H.R. 2977, 96th Cong., 1st sess., 125 Cong. Rec. H1317 (1979).

[114] Ibid.

[115] See, U.S., Commission on Civil Rights, staff report, "The Legal System and Women Victims of Domestic Violence, Phoenix," February 1980, pp. 36–44.

[116] Patricia MaGrath, testimony, *Phoenix Hearing*, p. 17.

> Another common thing that happens is he will destroy every specific piece of documentation she has for this specific purpose, so she cannot prove who she is. I have had them tear up her social security card, every piece of documentation she has.[117]

The welfare application procedure is sometimes halted at this time of need due to lack of appropriate documentation.

If a woman completes an application form and qualifies for financial assistance, she may be required in some jurisdictions to wait 4 to 6 weeks to receive her first check.[118] Del Martin addressed this issue at the national consultation:

> In St Louis, Missouri, I am told, it takes from 4 to 6 weeks for the first welfare check to come, during which time the woman must have established a permanent residence, been cleared by a social worker who makes a home visit, and provided the department of social services with proof of birth and social security numbers for herself and her children. To rent a place the women needs money, and rent vouchers are difficult to obtain. If she is lucky enough to get one, however, she finds that most landlords won't accept rent vouchers. They want cash on the line. Without a place to go or means of support until she can become independent, the wife/victim is often forced to return to her violent husband.[119]

Attitudes of welfare workers were also discussed. In Phoenix, the director of the Arizona Department of Economic Security testified that "many of the [welfare] programs that we inherited were run by people basically who had been hired to protect the State system from those people out there who are trying to rip it off."[120]

In an interview, a shelter representative noted that "most women are scared to begin with when they go to welfare, and during their first visit to the welfare office, agency personnel destroy any confidence they may have in themselves."[121] During the Phoenix hearing, the assistant director of the Arizona Department of Economic Security admitted that the attitudes of many workers hamper their ability to assist persons seeking welfare and said that he is trying to change that.[122] He testified that:

> . . .I came to the State, November a year ago, and [the person]. . .who is responsible for the family assistance program, pointed out to me very early on that despite the fact that we have some very good staff, the success of the public welfare programs for many years has been measured by how many dollars you turn back to the general fund at the end of the year.
>
> We had a substantial problem, and still have a problem in some areas relative to client access to services, the fact that we are here to serve them, not the other way around. It was necessary about 5-1/2 months ago to relieve the problem managers, both Phoenix and Tucson, public assistance food stamp programs, as well as five local office managers here in Phoenix on this exact issue, relative to AFDC and food stamps.
>
> I hope we have made the point, when clients come to the office, we take their applications. If there are instances where that is still not the case, I would certainly be interested in knowing what those are.[123]

Many States have emergency assistance programs that are available to assist battered women who leave a battering spouse. Each State's ability to assist these women depends on its welfare policies and the amount of funds in the emergency assistance program. For example, the State of Arizona in 1980 allocated $800,000 for its emergency assistance program.[124] During the Phoenix hearing, the assistant director of the department of economic security indicated that the emergency assistance program was intended to provide assistance on a one-time basis to applicants.[125] Nevertheless, in some instances, an applicant can be provided benefits three times in a 12-month period.[126] The level of support is low, however, the average benefit provided in Phoenix being $70.[127]

An applicant for emergency assistance in Arizona must satisfy the documentation requirement for the general welfare application and have a home and evidence of her emergency needs.[128] Shelter personnel in Phoenix voiced concern that qualifying for emergency assistance was impossible for battered women, since few have a place to live.[129]

The emergency assistance program differs in Pennsylvania, according to the district director of the Dauphin County Department of Public Welfare:

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[117] Ibid., p. 18.

[118] Martin Statement, *Consultation*, p. 10.

[119] Martin, *Battered Women*, p. 121.

[120] William Jamieson, Jr., testimony, *Phoenix Hearing*, p. 153.

[121] Magrath Interview, Dec. 4, 1979.

[122] Thomas McLaughlin, testimony, *Phoenix Hearing*, p. 143.

[123] Ibid.

[124] Ibid., p. 142.

[125] Ibid.

[126] Arizona Department of Economic Security, Arizona Welfare Laws, *Income Maintenance*, R6-3-804, vol. 3 (1977) (hereafter cited as *Income Maintenance*).

[127] McLaughlin Testimony, *Phoenix Hearing*, p. 142.

[128] *Income Maintenance*, R6-3-201 c (A).

[129] Magrath Testimony, *Phoenix Hearing*, pp. 17-18.

> Emergency assistance is assistance we can give to a person for a period of 30 days if they are not eligible for our regular grants; that is, if an emergency occurs in their lives that might disrupt their family life or their individual functioning—they might be homeless because of some emergency, something of that sort—then we can give assistance for a short period of time.[130]

Battered women wih urgent needs can qualify for emergency assistance in Pennsylvania. The amount of emergency funds allocated, however, would be limited to the minimum dollar amount that the local office verifies is required to meet the emergency needs of the applicant.[131] In addition to the money awarded, a family or individual could receive an emergency shelter allowance of $100 for 1 month or $300 for 3 months' arrearage.[132]

In addition to emergency assistance, many battered women with children qualify for welfare assistance under the aid to families with dependent children program (AFDC). Again, benefit levels vary from State to State. In Arizona:

> The aid to dependent children program. . .is in the bottom 10 percent in the country. I don't know, it's 37th in the Nation or something along this line, it's woefully inadequate, to say the least, as far as the amount of benefits, the type of benefits that are offered. . . .[133]

To exemplify the level of AFDC benefits in Arizona, the assistant director of the Arizona Department of Economic Security testified:

> The current benefit levels run, just perhaps as an example, a monthly benefit for a mother with three children is $240 per month. I can go on if you like: $274 for a family of 5, $306 for a family of 6, and so forth.[134]

In Phoenix, a mother with three children could also qualify for food stamp benefits totaling approximately $240.[135] The director of the department of economic security testified that:

> This State—and I believe society in general—expects people who are receiving assistance to be on some kind of a track moving toward self-sufficiency. In my opinion, the level of benefits in Arizona [is] such that that will never happen. An individual with the amount of money that we make available to them cannot in any way move toward self-sufficiency.[136]

Many battered women facing the grim financial prospect of public assistance and housing often are forced by economic circumstances to return to the home and the abuser.

Legal assistance is often needed by victims of domestic violence, many of whom cannot afford to hire an attorney. In 1974 Congress enacted the Legal Services Corporation Act to provide access to the justice system for all persons in the country who could not afford it.[137] Legal services programs have been unable to meet the vast demand for their services, however.[138] At the Commission's hearing in Phoenix, the executive director of Legal Services, noted:

> In Maricopa County [where Phoenix is located] we have approximately 180,000 individuals who would be eligible for our services under guidelines established by the Legal Services Corporation. . . .In 1975 the American Bar Association and American Bar Foundation did a joint study of the probable incidence of the demand for legal service by low-income people. . . .Based on [the study's] projection, we would estimate that in excess of 41,000 clients, in the course of a calendar year, might very well need our services in Maricopa County. . . .We are able to serve 5,000 or about 12 percent of the total needs.[139]

Phoenix Legal Services has designated assisting women with domestic violence problems as a high priority among the cases to be pursued. Criteria considered in agency selection of domestic violence victims to represent include whether the violence is recent (within the last 6 months) and whether the abuser is still in the general area with the apparent ability to harm the woman.[140] Despite the high priority of such cases, a legal services representative at the hearing testified that Legal Services has a very limited ability to assist women in shelters:

> The only thing that we can do for a client who has been physically abused is to start a domestic relations proceeding, either a legal separation or a dissolution of the marriage. This is the only civil remedy that we really can do for those clients. . . .[141]

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[130] Robert Hanna, testimony, *Harrisburg Hearing*, p. 153.

[131] Commonwealth of Pennsylvania, Department of Public Welfare, Public Eligibility Manual Procedure Release, 289.3(c) (undated).

[132] Ibid., 289.4(a)(2)(i).

[133] McLaughlin Testimony, *Phoenix Hearing*, p. 141.

[134] Ibid.

[135] Jamieson Testimony, *Phoenix Hearing*, p. 154.

[136] Ibid.

[137] The Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified at 42 U.S.C. §2996–2996i (1976 and Supp. III 1979)).

[138] James Keenan, testimony, *Phoenix Hearing*, p. 162.

[139] Ibid.

[140] Lois Kermott, testimony, *Phoenix Hearing*, p. 163.

[141] Ibid.

The preliminary injunction is helpful to a number of battered women in Arizona whose mates are afraid to disobey court orders.[142] In many instances, however, where the preliminary injunction is not obeyed, the only remedy available is to return to court for contempt proceedings.[143] Contempt procedures, especially for Legal Services clients, are burdensome; not only do they represent an additional expense, but also the time lapse between initiating the proceeding and obtaining the contempt order minimizes the effectiveness of the remedy.[144] Moreover, in domestic violence cases, "judges [in Phoenix] rarely punish by jail sentence or fine a person found guilty of contempt."[145] Ms. Kermott explained that:

> The abuser is often found guilty of contempt but then the court orders that he can purge himself of that contempt if he doesn't do it anymore, so the result is that the petitioner has a worthless piece of paper. Then the same person who has been abused cannot get a peace bond in the city of Phoenix, except in the South Phoenix precinct, and according to my clients, the police are unwilling to assist them because it is a civil matter. . . .[T]he net effect is that the abused woman is unprotected by the legal system.[146]

Legal services attorneys in Pennsylvania not only handle a large number of domestic violence cases, but in some areas bring the bulk of the actions under the Protection From Abuse Act.[147] In most cases, protection orders are obtainable for battered women through Legal Services regardless of their spouses' income. According to the director of a legal services program in Pennsylvania:

> We currently, under recent State regulations, applying different tests to eligibility for people in abuse cases than most of our other clients. . . .[I]t is not necessary for us to consider income to determine eligibility in abuse cases. . .what that means, in effect, in our program is that we will make sure, if someone comes in with an abuse problem, that that person has counsel. . . .We do not use income cutoffs in the same way we would with clients in other kinds of cases.[148]

Not all legal services offices have made domestic violence a high priority, however. Marjory Fields, a Brooklyn Legal Services Corporation attorney, has critized the Legal Services Corporation's response to the needs of battered women:

> Many of these civil legal problems could be surmounted if there were adequate free legal counsel available for battered women. The Legal Services Corporation. . .places low priority on family law and fails to recognize the emergency nature of battered wives' problems. Local offices handle many undefended divorces, but they have long waiting lists and do not regard wife beating cases as requiring immediate, out-of-turn attention. The few battered women's law projects or special units devoted to women's issues are supported by private foundations and Comprehensive Education and Training Act grants. The Litigation Coalition for Battered Women, composed of attorneys from three neighborhood legal services offices in New York City, was denied an ongoing "special needs grant" from Legal Services Region II.[149]

Moreover, as part of its fiscal year 1982 budget reduction, the administration recommended abolishing the Legal Services Corporation.[150] At the time of publication, Congress had not resolved the issue.

Findings

Finding 7.1: Shelters provide vital and essential support services for battered women.

Finding 7.2: Shelter personnel are trying to educate and sensitize the public about domestic violence, but their task is difficult because of ingrained attitudes.

Finding 7.3: Shelter personnel are sensitizing the justice system by educating police, prosecutors, and judges about the battering syndrome.

Finding 7.4: Shelters for abuse victims cannot continue without support from the public and private sectors.

Finding 7.5: Battered women in rural areas have unique problems to which the justice system has responded ineffectively.

Finding 7.6: Shelters assist battered women to obtain available financial assistance, counseling, and family services through the public welfare system.

Finding 7.7: After leaving violent homes, many battered women seek advice and assistance from legal services offices, which may help the victims obtain divorces and civil protection orders. Recent proposals to reduce or eliminate funding for the

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[142] Ibid., p. 164.

[143] Ibid.

[144] Ibid.

[145] Ibid.

[146] Ibid.

[147] Nancy Rourke, attorney, Central Pennsylvania Legal Services, interview, April 1980.

[148] Lawrence Norton, testimony, *Harrisburg Hearing*, p. 155.

[149] Marjorie Fields, statement, *Consultation*, pp. 273–74.

[150] U.S., Executive Office of the President, Office of Management and Budget, *Fiscal Year 1982 Budget Revisions: Additional Details on Budget Savings* (April 1981), p. 362.

Legal Services Corporation, however, may mean reduced services to battered women.

Chapter 8

Summary of Findings and Recommendations

Chapter 3: The Police

Finding 3.1: Police decisions, including departmental policies and the practices of individual officers, affect the justice system's ability to protect the legal rights and physical safety of battered women.

The police stand at the entrance to the justice system, and their actions often prevent or discourage battered women from pursuing criminal remedies against their abusers. Left unchecked, spouse abuse generally increases in severity as time passes, resulting in the victim's death in many cases. Where police policies and practices are based on misperceptions of domestic violence, officers are unlikely to respond effectively to battered women's calls for assistance, which perpetuates and reinforces the patterns of violence.

Recommendation 3.1: Police officers should receive specific training for handling domestic violence cases. Such training should be developed in cooperation with those who are operating shelters for battered women and others familiar with the particular needs of battered women.

Finding 3.2: Police traditionally have viewed most incidents of spouse abuse as private matters that are best resolved by the parties themselves without resort to the legal process.

Underlying the notion that spouse abuse is a private rather than a police matter is the belief that assault is not a crime if the assailant is related to the victim. Many police departments subscribe to this philosophy, although the criminal law allows for no such exception.

Recommendation 3.2: Police officers responding to domestic violence calls should take whatever action would be appropriate were assailants and victims not related or acquainted, while bearing in mind the extra protection necessary for victims who may be emotionally or financially dependent on their assailants. If investigation of the facts surrounding a dispute discloses that an assault has occurred, the officers should take appropriate action against the assailant.

Finding 3.3: Police generally are reluctant to respond to domestic disturbances, which the officers view as dangerous to themselves, emotionally charged, and difficult to resolve. Some police departments do not require officers to respond to such calls, while other departments assign the calls low priority.

Although the relationship between the victim and assailant in abuse cases increases the danger of serious injury or death, the assignment of low response priorities on the basis of such a relationship indicates that police generally do not view the situation as critical. Some departments also adopt policies limiting the types of situations to which they will respond, ignoring calls where an assault has been threatened but has not yet occurred or where the assailant has left the scene.

Recommendation 3.3: The police should respond in person to every call alleging abuse. Police departments should assign response priorities for abuse calls according to the standards established for all other violent crimes, that is, according to the degree of danger to the victim.

Finding 3.4: Many police departments apply formal or tacit arrest-avoidance policies to domestic violence cases.

Several factors, including the beliefs that spouse abuse is a private matter and that arrest will not ultimately result in conviction or sanction, have led police to avoid arresting abusers. Police officers in many jurisdictions also claim they fear lawsuits for false arrest if the alleged assailant is found innocent in court, but the standards for false arrest are the same in abuse cases as in any other type of case and should not deter police from making arrests where appropriate.

Recommendation 3.4: Police departments should abandon policies of noninterference and arrest avoidance for domestic assaults. Where officers have probable cause to believe a crime has occurred, they should make an arrest. In circumstances where the officers are not empowered to arrest, they should explain citizen arrest procedures to the victim and assist her in making such an arrest. Police should enforce laws prohibiting spouse abuse without regard to the actions they think that prosecutors and courts subsequently may take.

Finding 3.5: Police officers are trained and encouraged to apply mediation and conciliation techniques in cases involving criminal spousal assault, where such techniques are inappropriate.

Communication skills and crisis intervention techniques can be useful tools to help police gather information about whether a crime has been committed and to help officers refer victims to social services or legal assistance. Many police departments, however, encourage the use of such tools to replace rather than augment the criminal process, with officers attempting to mediate between the victim and the assailant to resolve the conflict without further involving the justice system.

Recommendation 3.5: Although police officers should be trained in communications and crisis intervention techniques and be able to suggest the use of other remedies and services available to abuse victims, the officers should not use these routes as substitutes for law enforcement and should not attempt to resolve privately conflicts that have resulted in violations of the law.

Finding 3.6: Instead of taking appropriate police action, officers frequently recommend that domestic assault victims seek civil legal remedies or file private criminal complaints.

Where civil remedies to spouse abuse are available, the police sometimes mistakenly believe that the civil process is meant to supplant the criminal process. This notion is fostered by departmental guidelines that lump domestic assaults with noncriminal matters, such as landlord-tenant and neighbor disputes, or that state or imply stricter arrest standards for spouse abuse than for other violent crimes. When officers refer the victim to civil or private criminal remedies, they leave her responsible for enforcing the law and, thus, subject to threats and pressure from her assailant if she proceeds against him.

Recommendation 3.6: Although police officers should explain available remedies and services to abuse victims and make referrals to the appropriate offices or agencies, departmental policies should emphasize the criminality of domestic assaults and encourage officers to resolve them in a professional manner, making arrests where appropriate. The officers should make it clear that they are acting as agents of the State or community, rather than shift their responsibilities to the victim.

Finding 3.7: Police officers frequently try to separate the assailant and victim for a short time, rather than make an arrest. In such cases, shelter facilities for battered women and their children provide a vital service.

When police do not arrest an assailant, he may continue harassing or abusing his victim unless she has an alternative place to stay. The homes of friends and relatives are generally accessible to abusers, and hotel costs are prohibitive for the many victims who are financially dependent upon their assailants. Consequently, shelter facilities can be life-saving refuges.

Recommendation 3.7: Although officers should not use shelters for victims of domestic violence as substitutes for arresting assailants, police departments should continue and increase their cooperation with shelter personnel. Officers should provide victims with information about available shelters and arrange transportation when necessary to protect victims and their children.

Finding 3.8: Existing reporting practices handicap police ability to deal effectively with domestic assault cases and unnecessarily limit the amount of available information about spouse abuse.

Police officers often fail to write reports on incidents of domestic violence that do not result in arrest. As a result, although domestic assaults are more likely than other assaults to recur, there frequently is no record to alert officers to an assailant's history of violent behavior. When officers do record domestic assaults, they often neglect to report whether the incidents involved force or the threat of force or to indicate the relationships of the parties, which may make the reports impossible to distinguish from those of assaults involving strangers.

Recommendation 3.8: Police departments should reform their recordkeeping procedures to assure that the officers and outside agencies have access to more complete information about domestic violence. The Federal Bureau of Investigation should assist this effort by creating "stranger" and "nonstranger" categories within Uniform Crime Reports statistics on assault and aggravated assault. The "nonstranger" category should include a further breakdown by relationship of the parties. Statistics on activities in which police officers were assaulted or murdered should also be broken down into domestic disputes and other disputes.

Chapter 4: The Prosecutors

Finding 4.1: Prosecutors enjoy wide discretion to determine which criminal cases will be prosecuted and often accord low priority to cases involving domestic violence.

Beyond deciding whether there is enough evidence to prosecute individual cases, prosecutors often make policy decisions about what types of cases to pursue. Most prosecutors have large caseloads and allocate office resources by establishing priorities for prosecution. Spouse abuse cases tend to receive very low prosecutorial priority, which frequently influences how police and judges respond to such cases. Police officers, for example, may be less interested in arresting an assailant if they know the prosecutor probably will not pursue the case.

Recommendation 4.1: Prosecutors should give battered women the same protection, support, and respect given other victims of violent crime, by establishing equitable charging policies and encouraging police and judges to handle domestic violence fairly and appropriately.

Finding 4.2: The rate of prosecution and conviction in criminal cases drops sharply when there is a prior or present relationship between the alleged assailant and the victim.

Prosecutors often accord defendants in domestic assault cases preferential treatment not shown defendants in other assault cases. At the same time, abuse victims must overcome procedural barriers, such as waiting periods, that do not apply to victims of other violent crimes.

Recommendation 4.2: Prosecutors should base charging decisions only on the merits of the cases.

Finding 4.3: Some prosecutors hesitate to file charges against abusers, based on the belief that domestic violence is a noncriminal, personal matter or that prosecution would adversely affect the parties' marriages.

Like other law enforcement officials, many prosecutors suffer misconceptions about domestic violence and are unaware of its tendency to escalate, even to the point of murder. Although spouse abuse may seem a purely domestic problem to many prosecutors, their role is to prosecute criminal acts resulting from domestic disputes.

Recommendation 4.3: Prosecutors should receive training about the causes and criminal nature of spouse abuse and about procedures for enforcing statutes that prohibit such conduct.

Finding 4.4: Prosecutors often treat victims of spouse abuse as if they, rather than the defendants, were accused of criminal conduct.

Victims of domestic violence, like rape victims, have had to endure the doubts, accusations, and contempt of many law enforcement officials, who assume that the women incite their assailants to violence. Many prosecutors exhibit this kind of prejudice, discounting victims' descriptions of events because of their relationships with their assailants.

Recommendation 4.4: Prosecutors should treat abuse victims no differently from victims of other crimes, recognizing that physical violence is a legally unacceptable response to personal or family stress and that responsibility for criminal acts lies with those who commit them, regardless of their relationships with their victims.

Finding 4.5: Prosecutors frequently attribute the low rate of prosecution in spouse abuse cases to lack of victim cooperation, which may become a self-fulfilling prophecy. Prosecutors who believe that abuse victims will not cooperate with the prosecution of their cases frequently discourage the victims from using the criminal justice system.

Studies have shown that prosecutors tend to overestimate the number of battered women who refuse to cooperate in the prosecution of their abusers, but the fact remains that the rate of attrition in such cases is high. Prosecutors often decline or dismiss abuse cases on the presumption that victims ultimately will not cooperate, regardless of what they say during initial interviews. Many prosecutors delay filing charges in abuse cases until a waiting period has passed to give victims time to change their minds about prosecuting before work begins on their cases. Some prosecutors downplay the likelihood of successful prosecution, attempting to persuade victims to drop the charges, seek civil action, or agree to allow defendants to participate in diversion programs instead of going forward with prosecution. These practices undermine the goals of prosecuting violent crime and deterring repeat offenses.

Recommendation 4.5: Prosecutors should not apply more stringent filing requirements or charging policies to domestic assaults than to other assaults and should not decline or dismiss meritorious cases.

Finding 4.6: Prosecutors rarely subpena victims to testify in abuse cases, although such action frequently could circumvent victim noncooperation.

Prosecutors often subpena hostile witnesses in cases involving violent crimes. Because prosecutors generally view spouse abuse as a private matter, however, they rarely subpena abuse victims who are reluctant to testify. Instead, the decision whether to prosecute becomes the victims' responsibility. As a result, many victims elect to drop the charges because they fear renewed violence if the prosecution goes forward. Where prosecutors subpena victims, defendants cannot use threats of violence to coerce victims, and victim cooperation is more likely.

Recommendation 4.6: Prosecutors should use their authority to require the attendance and testimony of victims by subpena where this will advance the prosecution of the case or protect and support the victims.

Finding 4.7: Prosecutors frequently charge spouse abusers with crimes less serious than their conduct seems to warrant.

Many prosecutors routinely charge abusive spouses with minor offenses, such as harassment, even where the victim has been seriously injured.

Recommendation 4.7: Charges in abuse cases should reflect the seriousness of the crime.

Finding 4.8: Some prosecutors have improved their handling of domestic violence cases by offering innovative support services to battered women.

In some cities, prosecutors have established programs that emphasize to victims and assailants that spouse abuse violates criminal law and that the State will treat it as any other crime against public peace and security. These programs offer support services to victims, which elicits their cooperation and trust, and make referrals to help victims meet needs that are not met by prosecution and sentencing.

Recommendation 4.8: Prosecutors should take full advantage of experimental domestic violence projects and institute policy and procedural changes to improve handling of abuse cases.

Chapter 5: The Courts

Finding 5.1: Although civil and criminal remedies to spouse abuse are most effective when used in conjunction with one another, there is confusion between these types of remedies, which undermines enforcement of both.

In jurisdictions where civil protection orders are available, some law enforcement personnel assume that victims must obtain such orders before they are entitled to police protection, which hinders enforcement of the criminal laws. At the same time, civil court judges often hesitate to enforce civil protection orders, in part because the penalties generally provided by State statutes are quasi-criminal rather than civil in nature. In some jurisdictions, civil court judges have tried to transfer cases to the criminal courts, rather than impose criminal remedies. Sanctions for violating protection orders in spouse abuse cases, however, are no different from sanctions for violating many other civil orders.

Recommendation 5.1: States should provide training for judges, magistrates, justices of the peace, and other law enforcement personnel to clarify the appropriate sanctions for violating civil protection orders and criminal laws relating to spouse abuse.

Finding 5.2: Most cases of spouse abuse never reach courts of general jurisdiction. Entry-level courts generally resolve those cases police or prosecutors have not diverted previously.

Spouse abuse cases seldom come to court, but when they do, they usually are handled by magistrates and justices of the peace. These members of the minor judiciary greatly influence the way the justice system treats abuse cases, frequently deciding what charges to bring against defendants and holding hearings that dispose of cases. The types of remedies that magistrates and justices of the peace can offer battered women, however, often are limited to peace bonds, harassment citations, or similarly ineffectual options.

Recommendation 5.2: Magistrates and justices of the peace with jurisdiction over any aspect of spouse abuse cases should be trained on the laws governing relevant offenses and on the battering syndrome. Where protection orders are available to abuse victims, members of the minor judiciary should be given jurisdiction to issue such orders, at least temporarily, until a higher court can hold a hearing on the issue.

Finding 5.3: There are advantages and disadvantages inherent in both civil and criminal remedies to spouse abuse, but some judges prefer one type of remedy and use it exclusively.

Civil remedies, such as protection orders, may be faster and more flexible than criminal remedies and may resolve problems without the social stigma and economic deprivation criminal convictions may cause. In some cases, however, incarceration may be necessary to prevent abusers from renewed attacks, or the nature of the violence may demand prosecution. In such situtations, criminal remedies are warranted. Despite the utility of both types of remedies, some judges prefer to resolve all abuse cases with only one approach.

Recommendation 5.3: Both civil and criminal remedies have a role in spouse abuse cases and should be used in a coordinated manner to provide maximum protection for battered women.

Finding 5.4: When abusers are convicted, judges seldom impose sanctions commensurate with the seriousness of the offenses or comparable with sanctions for similar violence against strangers.

Incarceration of abusers is rare. Instead, magistrates and justices of the peace routinely treat spouse abuse as a minor offense and impose nominal sanctions, generally a small fine, while judges frequently suspend sentences, defer judgments, or grant probation for convicted abusers. When abusers violate conditions of probation, judges seldom revoke their probation, and repeat offenses often lead to penalties no greater than those for first offenses. Such sanctions do little to deter future abusive behavior.

Recommendation 5.4: Judges should impose sanctions in spouse abuse cases commensurate with the seriousness of the offenses and comparable to those imposed in cases where the parties are not related or acquainted. Judges should impose stiff penalties on repeat offenders and on defendants who threaten their victims, trying to coerce them into dropping charges. Probation, suspended sentences, and deferred judgments should be available only in first convictions for offenses not involving serious injury, and violation of any conditions attached to such dispositions should result immediately in appropriate sanctions.

Finding 5.5: Although civil orders prohibiting abusive conduct or excluding abusive spouses from their families' homes fill a distinct need not met by criminal remedies, such orders are not available to many battered women.

Protection orders for victims of spouse abuse are not available under the laws of many States. In other States, despite statutes authorizing protection orders, some judges are reluctant or unwilling to issue such orders, in part out of concern for the rights of abusers. Even where judges are willing to issue protection orders, abuse victims do not have a right to counsel when seeking civil remedies, as opposed to criminal remedies, and the orders may not be available quickly enough to prevent further violence.

Recommendation 5.5: States should enact legislation to provide protection orders for abuse victims and should provide coordination at the State level to ensure effective implementation. Victim/witness programs should be available in every jurisdiction to assist battered women throughout the judicial process. Advocacy services should be available for those seeking civil remedies as well as for those filing criminal charges.

Finding 5.6: When abusers violate protection orders, many judges fail to impose meaningful sanctions.

Some judges routinely find abusers in contempt of court for violating protection orders and then tell the abusers that they can purge themselves of contempt of court by not repeating their contemptuous conduct. Judges often treat each new offense as a new act, without regard to previous strictures against such conduct.

Recommendation 5.6: Judges should order punishment for violations of protection orders with meaningful sanctions to ensure the deterrent value of such orders.

Finding 5.7: Many judges approach abuse cases as isolated incidents of aberrant behavior between consenting adults rather than as examples of a widespread societal problem.

Judges frequently express the view that spouse abuse is a "family" matter that should remain out of public view. Many judges believe that their sworn duty to uphold the sanctity of marriage supersedes their duty to enforce criminal laws. As a result, such judges are routinely lenient in spouse abuse cases, reinforcing patterns of violence by signaling abusers and victims that the courts will not interfere in their conduct.

Recommendation 5.7: State associations of judges should provide training for members on the battering syndrome and should encourage judges to treat spouse abuse as a serious crime. Judges should provide leadership for other members of the justice system, including the private bar, and should make it clear to victims and abusers that the courts will not tolerate domestic violence.

Chapter 6: Diversion Programs

Finding 6.1: Prosecutors often use informal hearing procedures to screen out spouse abuse cases. Such informal settings tend to produce an atmosphere of fear and coercion for abuse victims, frequently result in no criminal action against defendants, and minimize any implication of wrongdoing by abusers.

When diversion programs originally were established, defendants who had been accused of crimes of violence were not eligible to participate. As the programs evolved, however, many began to allow participation by spouse abusers. By diverting spouse abuse cases away from the criminal justice system before trial, law enforcement officials imply to victims and assailants that the abusive conduct is something less than criminal. Agreements or conditions established in such informal settings rarely have the force of law or result in prosecution when violated. Consequently, victims and assailants are left with the impression that the justice system will not interfere with abusive conduct.

Recommendation 6.1: Pretrial diversion programs are inappropriate in cases involving serious or repeated physical violence and are not recommended. Where such programs exist, however, immediate prosecution should result from violations of any conditions the programs establish.

Finding 6.2: Mandatory counseling for spouse abusers can be effective, especially after conviction when the counseling is a condition of probation. In many jurisdictions, however, such programs are available to defendants charged with very serious or repeat offenses, where diversion is generally inappropriate.

In cases where the pattern of abuse has not yet resulted in serious injury, and where abusers genuinely desire to alter their behavior and have the additional motivation of incarceration for failure to do so, counseling may help them learn how to handle stress without resorting to violence. Where defendants are charged with serious or repeat offenses, mandatory counseling is an insufficient sanction.

Recommendation 6.2: Mandatory counseling should not be used instead of prosecution, but should be used only as a condition of probation. Violations should result in immediate revocation of probation.

Finding 6.3: Mediation and arbitration, which are generally inappropriate for settling domestic problems where one party has been violent to the other, are still used as substitutes for prosecution in some jurisdictions.

Mediation and arbitration place the parties on equal footing and ask them to negotiate an agreement for future behavior. Beyond failing to punish assailants for their crimes, this process implies that victims share responsibility for the illegal conduct and requires them to agree to modify their own behavior in exchange for the assailants' promises not to commit further crimes.

Recommendation 6.3: Mediation and arbitration should never be used as an alternative to prosecution in cases involving physical violence.

Chapter 7: Shelters and Social Services

Finding 7.1: Shelters provide vital and essential support services for battered women.

Shelters provide abuse victims with a safe place from which to pursue legal remedies. Shelters also offer necessary housing and emotional assistance to battered women and their families, who are often emotionally dependent upon their abusers and impoverished.

Recommendation 7.1: Congress should ensure that the U.S. Department of Health and Human Services has the authority to monitor the nationwide establishment of emergency shelters for abuse victims in each State. If a State is determined to be shirking its duties, then the Department of Health and Human Services should provide direct technical assistance and training to shelter operators and grants to public and nonprofit private agencies for domestic violence projects.

Finding 7.2: Shelter personnel are trying to educate and sensitize the public about domestic violence, but their task is difficult because of ingrained attitudes.

In the past, social service agencies treated spouse abuse as aberrant behavior between individuals, rather than as a societal problem. Now, social service personnel are coming to understand that violence is a learned behavior and that children who grow up in violent homes generally perpetuate the patterns of violence as adults, both in their own homes and in their relations with outsiders. Those who operate battered women's shelters are trying to educate the public about the consequences of allowing violence to go unchecked, but meager funds make it difficult to counter widespread, ingrained attitudes about spouse abuse.

Recommendation 7.2: The U.S. Department of Health and Human Services should monitor State and local public education programs to ensure that there are concerted efforts to sponsor media campaigns, similar to those on alcoholism and child abuse, to increase public awareness about spouse abuse.

Finding 7.3: Shelter personnel are sensitizing the justice system by educating police, prosecutors, and judges about the battering syndrome.

Some shelters have placed special emphasis on educating police, since they are the first contact battered women generally have with the justice system. Many police departments welcome shelter assistance in providing training to officers because responding to spouse abuse calls traditionally has been a frustrating experience for the police.

Recommendation 7.3: The U.S. Department of Education should monitor the development of State and local projects to train police, prosecutors, judges, school teachers, mental health workers, clergy, and others who come into contact with battered women in the course of their professions.

Finding 7.4: Shelters for abuse victims cannot continue without support from the public and private sectors.

Shelters are the cornerstone of support services for battered women who are forced to leave home to escape violent spouses. Nevertheless, most shelters must piece their budgets together from any available source. Until public and private funding sources recognize shelters as essential, shelter personnel will have to spend inordinate amounts of time struggling for funding to survive.

Recommendation 7.4: Each State should establish a domestic violence office to coordinate State, Federal, and local programs within the State, in order to ensure that adequate funding is provided for projects such as counseling for abusers and victims, shelters, and training, and to compile statistics on spouse abuse.

Finding 7.5: Battered women in rural areas have unique problems to which the justice system has responded ineffectively.

The isolation of rural life compounds the problems battered women normally face. Public transportation is usually nonexistent. There may be no neighbors nearby to hear cries for help. The police may have to travel great distances to respond to victims' calls. Shelter facilities are not readily available, and local attitudes may make it difficult to turn to friends or relatives for assistance.

Recommendation 7.5: Shelters for battered women should be established in rural areas, and transportation should be available so that victims can use such facilities.

Finding 7.6: Shelters assist battered women to obtain available financial assistance, counseling, and family services through the public welfare system.

Beyond providing refuge from violence, shelters help abuse victims by making referrals to social service agencies that can provide additional support services. Eligibility requirements and benefits vary significantly from State to State, but battered women generally qualify for assistance if they have been financially dependent on their abusers before coming to the shelters. Shelter personnel can help an abuse victim with the problems she may encounter with welfare departments and other social service agencies if there is confusion about her eligibility.

Recommendation 7.6: Welfare departments should establish policies to expedite applications for assistance from battered women.

Finding 7.7: After leaving violent homes, many battered women seek advice and assistance from legal services offices, which may help the victims obtain divorces and civil protection orders. Recent proposals to reduce or eliminate funding for the Legal Services Corporation, however, may mean reduced services to battered women.

Legal services provide access to the justice system for those who could not otherwise afford it. Because many battered women do not have independent income, they are likely to qualify for legal assistance for divorces and civil protection orders. When legal services offices allocate their reduced resources, it is unclear that they will be able to continue serving battered women at present rates.

Recommendation 7.7: Congress should encourage the Legal Services Corporation to make legal services for battered women a high priority for local programs.

APPENDIX

CITY OF PHOENIX • OFFICE OF THE MAYOR

MARGARET T. HANCE
MAYOR

August 21, 1981

Mr. Paul Alexander
Acting General Counsel
United States Commission
on Civil Rights
Washington, D.C. 20425

Dear Mr. Alexander:

Thank you for allowing us to review your report on domestic violence. Domestic violence is a complex and serious problem in our society.

The excerpts of testimony in your report appear to be factual and complete. The testimony presents a generally fair picture of past criminal justice system handling of domestic violence in our community.

Although one alternative includes strong arrest, prosecution and sentencing practices in domestic violence cases, I believe that some of the conclusions and implications made by the report authors ignore the real problems of developing stronger enforcement. They also suggest that criminal system sanctions in themselves can have a dramatic impact on the problem.

The Police, Prosecution and Court Systems have a very heavy workload and are pressed to fulfill their responsibilities with increasingly limited resources. If a wife in a domestic violence case ultimately refuses to testify against her husband, a great amount of work, time and tax-supported expense has been consumed for nothing. Other important criminal justice actions will have been left undone due to lack of resources. For this reason, all elements of the criminal justice system have sought a strong case before initiating prosecution.

Criminal justice system action is only one element of what is needed to significantly reduce domestic violence. Overemphasis on police response tends to downplay the importance of trained interpersonal intervention to change the involved people and their relationships. A long-term solution to this problem surely depends more on these personal and sociological changes than on intermittent police intervention. Some of the police officer frustration which was discussed in the testimony comes from the realization by the police officer that he or she has only the time and training for very temporary interventions after a violent incident. They see the need for ongoing counseling and support but are unable to provide it.

Despite these longer range concerns, an effective criminal justice system response is necessary when violence erupts. Our ability to provide this response was improved locally with the adoption of domestic violence legislation by the Arizona State Legislature. The new statute allows protective orders for victims and provides police officers the authority to arrest for domestic violence offenses that were not committed in the officer's presence. This new legislation coupled by increased commitment by the new Phoenix Chief of Police, Ruben Ortega, has resulted in stronger action by Phoenix police in response to this problem.

I hope the City of Phoenix has been helpful to you in developing a better awareness of the problem of domestic violence.

Sincerely,

Margaret Hance

Margaret T. Hance
MAYOR

cc: Chief Ortega